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Preface

Tailhook . . . Aberdeen . . . LT Kelly Flinn . . . these names conjure up images of media frenzy and public scrutiny of the military justice system. Each time the media spotlights such incidents, the public re-examines and often criticizes the military and its system of justice. Sometimes, the system is defended; other times, the system is amended. However, these recent examples of public concern pale in comparison to the scrutiny that the military justice system received following World War II. The two million courts-martial of World War II personalized the question of military justice fairness for the one in eight United States citizens who were members of the Armed Forces. The public outcry for change ultimately resulted in the most significant transformation in the history of military justice. The result: the Uniform Code of Military Justice (UCMJ). The promulgation of the UCMJ, along with its principal implementing regulation, the *Manual for Courts-Martial*, marks the beginning of the modern military justice period. Now, fifty years later, it seems only appropriate that the military legal community mark this milestone with a symposium review of the origin, historical developments, and current criticisms of the military justice system.

Brigadier General (Retired) John S. Cooke's *Introduction* to this symposium edition details the promulgation of the UCMJ and its history, providing the reader with the background necessary to understand the current status and the areas ripe for change. Major General (Retired) George S. Prugh, Jr.'s *Observations-1954* gives the reader a glimpse into the modern military justice system in its infancy. His further retrospective, *Observations-2000* notes the personal challenges faced under the new system, as well as his reflections on the military justice system.

After an historical background, this symposium issue moves to a review of the highest military court, the Court of Appeals for the Armed Forces (CAAF), through the personal accounts of several of its judges. Major Walter M. Hudson, a former criminal law faculty member of the The Judge Advocate General's School, conducted interviews with two Senior Judges of the CAAF. Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III answer detailed, poignant questions about their personal and professional roles as members of the CAAF. Their perspectives on current issues facing the military justice system are enhanced by the

remarks of the current Chief Judge of CAAF, Susan J. Crawford, in the *Twenty-Eighth Hodson Lecture: Judicial Decision Making*.

Following this review of the CAAF, the symposium presents several modern-day practitioners suggestions for changes to the military justice system. Major Joanne P.T. Eldridge proposes a new punitive article in *Stalking and the Military: A Proposal to Add an Anti-Stalking Provision to Article 134*. Her article recommends that the military justice community respond to changes in civilian society and civilian criminal law. Major Steven M. Immel, in *Development, Adoption, and Implementation of Military Sentencing Guidelines*, asks the military justice community to consider adopting sentencing guidelines similar to the federal system, thereby addressing any real or perceived sentence disparity in our system. In *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, Kevin J. Barry discusses areas of the rule-making process that should be reformed to respond to public concern for the fairness of the system.

The symposium issue concludes with reviews of two different books on military justice. The first, *Vietnam Stories* is the memoirs of a judge advocate in Vietnam, reviewed by Colonel Frederic Borch. The second is volume two of Dr. Jonathan Lurie's history of the Court of Appeals for the Armed Forces, *Pursuing Military Justice*, reviewed by Major Walter Hudson. Although public criticism of the military justice system has diminished significantly since the post-World War II cries for reform, military justice is still a topic of public interest as demonstrated through the continued publication of books such as *Vietnam Stories* and *Pursuing Military Justice*.

The editors hope that this symposium offers interesting reading, thought provoking ideas, and practical advice to the military legal community. As Senior Judge Robinson O. Everett stated in the introduction to the Military Rules of Evidence Symposium, An Introduction in *Military Law Review*, Volume 130, on page 3, "Only through such self-examination can the military justice system live up to its full potential and remain responsive to a constantly changing military society."

The Publications section of the Legal Research and Communications Department at The Judge Advocate General's School, Charlottesville, Virginia, wishes to thank all those who contributed their time and efforts to

this symposium edition. We were fortunate to have the contributions of scholarly and dedicated authors. We thank the editorial board—Lieutenant Colonel Alan Cook, Colonel Sarah Merck, and Colonel Calvin M. Lederer—for supporting our vision for this symposium and our recommendations for its content. Finally, a special thanks to Lieutenant Colonel Robert Burrell, Chair of the Criminal Law Department, and the entire Criminal Law Department at The Judge Advocate General’s School, for painstakingly reviewing the countless submissions received to fill this volume.

Captain Mary J. Bradley, Editor
Charles J. Strong, Technical Editor

MILITARY LAW REVIEW

Volume 165

Symposium Issue

September 2000

INTRODUCTION:

FIFTIETH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE SYMPOSIUM EDITION

BRIGADIER GENERAL (RETIRED) JOHN S. COOKE¹

This introductory article to the symposium issue of the *Military Law Review*, which celebrates the Fiftieth Anniversary of the Uniform Code of Military Justice, discusses the history of military justice, why we have the Uniform Code of Military Justice (UCMJ), and how the UCMJ has developed. Finally, this article discusses some of the issues and challenges ahead.

It is appropriate and important to commemorate the enactment of the Uniform Code of Military Justice, the most important development in military justice since our country's founding. The UCMJ's Fiftieth Anniversary should serve as an occasion to remind ourselves of the essential

1. Director, Judicial Education, Federal Judicial Center. The Center is the research and education agency for the federal judicial branch. B.A., 1968, Carleton College; J.D., 1971, University of Southern California; LL.M. 1977, University of Virginia. In April 1998, he retired with the rank of brigadier general, after twenty-six years in the Army and The Judge Advocate General's Corps. His last position in the Army was as Chief Judge, U.S. Army Court of Criminal Appeals and Commander, U.S. Army Legal Services Agency. Previous assignments included judge advocate (senior legal advisor) for U.S. Army Forces in Europe; Deputy Commandant and Director, Academic Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; Chief, Personnel, Plans, and Training Office, Office of The Judge Advocate General; Staff Judge Advocate, 25th Infantry Division; Chairman, Working Group of the Joint Service Committee on Military Justice; trial judge in Nuremberg, Germany, Instructor, Criminal Law Department, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; and trial counsel and defense counsel, Fort Bliss, Texas.

This article is a revised version of remarks Brigadier General (Retired) John S. Cooke made at the 1999 Judge Advocate General's Worldwide Continuing Legal Education program on 8 October 1999 at The Judge Advocate General's School in Charlottesville, Virginia.

contribution the Code has made to military justice, and the value of military justice to the effectiveness of our armed forces. It should be a time to consider how and why the system has developed as it has and, for judge advocates, military justice's central place in their mission.

Military justice is judge advocates' historical reason for being—it is why William Tudor was appointed the first Judge Advocate on 29 July 1775, and from Tudor to Major General Walter B. Huffman it has been judge advocates' core mission. For most of the time it is been the predominant mission and, even today, with so many other missions and tasks for judge advocates, none is more important than military justice. That is because military justice is vital to morale and discipline in the armed forces and to public confidence in the armed forces. These are essential to winning in war and to success in any mission—that is not going to change.

As we look at the Code and the military justice system, it is worth remembering the important role judge advocates have played in their evolution. While Congress, the President, civilians in the executive branch, and others have played pivotal roles, judge advocates can be proud of the role they have played in the development of the military justice system. Judge advocates have sometimes been the identifiers and initiators of needed change. At other times they have resisted suggested changes. More often they have refined and revised proposed changes and made them more workable. But always, they have been the implementers of change, whatever the source, and the faithful stewards of the system prescribed by the people's representatives. With rare exceptions, they have served that role with distinction.

I. Before the Uniform Code of Military Justice

To understand the UCMJ and why we have it, one must understand what preceded it. The Code both built upon and broke with the past. What was retained, and why? What was discarded, and why? A brief look at the longer history of military justice is needed.

The 225-year history of military justice can be divided into two parts, which are defined by the operation under the Articles of War and the UCMJ. The Army operated under the Articles of War for the first 175-plus years, from 30 June 1775, when they were adopted by the Second Continental Congress, until 31 May 1951, when the UCMJ went into effect. The Navy, during this period, operated under the Articles for the

Government of the Navy.² For the last fifty years the military justice system in all the armed services has operated under the UCMJ.

Under the Articles of War military justice was a command-dominated system. The system was designed to secure obedience to the commander, and to serve the commander's will. Courts-martial were not viewed as independent, but as tools to serve the commander.³ They did a form of justice, but it was a different justice than that afforded in civilian criminal trials. Military justice had few of the procedures and protections of civilian criminal justice, and protecting the rights of the individual was not a primary purpose of the system.⁴

2. The Continental Congress adopted the "Rules for the Regulation of the Navy of the United Colonies" on 28 November 1775. The title was changed to "Articles for the Government of the Navy" in 1799. This article generally refers to the Articles of War and practice in the Army. Naval justice under the Articles for the Government of the Navy was in fundamental respects similar to the practice in the Army. If anything, it was probably more severe, and underwent even less change over its 175-year history.

3. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 49 (2d ed. 1920).

Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.

Id. (footnote omitted).

4. See *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 87-88 (1975) [hereinafter *JAGC HISTORY*]. Quoting General William T. Sherman:

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.

The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. An army is a collection of armed men obliged to obey one man. Every enactment, every

The original Articles of War were directly derived from the British Articles of War.⁵ Over their 175-year history, the American Articles of War changed relatively little. For most of that time, up until World War I, little impetus for change existed. In the nineteenth century, military justice exalted deterrence and punishment and relied heavily on the honor and character of the commander for justice. Unfortunately for many soldiers, the quality of their leaders varied widely. Well into the Nineteenth Century, officers frequently obtained their positions through patronage rather than martial or leadership skills,⁶ and throughout the Nineteenth Century, enlisted soldiers were drawn from the poor, uneducated, and newly immigrated.⁷ Punishment, or the threat of it, was seen as the only way to motivate such men.⁸ Except for the Civil War, during the nineteenth century

4. (continued)

change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.

Id.

5. WINTHROP, *supra* note 3, at 21-22. The Rules for the Regulation of the Navy of the United Colonies were likewise derived from the British Naval Articles. See HOMER MOYER, JR., JUSTICE AND THE MILITARY 9 (1972). It is not surprising that the colonists would look to familiar British sources to meet the urgent needs of organizing and governing the fledgling armed forces of the rebellion. It is ironic, however, given the attitudes that animated the revolution. The British Articles of War drew from rules developed in Roman and medieval times. Those rules rested, in large part, on a view of the relationship between leaders and the rank and file that was far different from the egalitarian principles espoused by revolutionary Americans. In earlier times, the common soldier was often a vassal of the lord who led him into battle, and was subject to the lord's rule and sense of justice in peace or war. Early military codes, from which the Articles of War evolved, reflected this relationship. See WINTHROP, *supra* note 3, at 17-18; G.M. TREVELYAN, A SHORTENED HISTORY OF ENGLAND 86-87 (1942). At the time of the Revolution, British officers were typically members of the nobility or upper class, sons of privilege and a special code of honor. Enlisted soldiers were usually drawn (and often impressed into service) from lower classes. This view of officers and enlisted soldiers drawn from different classes remained embedded in the American Articles of War.

6. See generally EDWARD M. COFFMAN, THE OLD ARMY, A PORTRAIT OF THE AMERICAN ARMY IN PEACETIME, 1784-1898, at 12, 43(1986). Various efforts, including the establishment of the United States Military Academy at West Point, led to gradual improvement in the professionalism of officers throughout the Nineteenth Century. *Id.* at 96-102, 269-86. This may have contributed to efforts, like that of William Winthrop, to place military justice on a more solid jurisprudential footing, (see *infra* note 11 and accompanying text), but it had little immediate impact on the military justice system. *Id.* at 375-76.

the Army and Navy were tiny.⁹ Operating on the frontiers and the high seas as they did, they were out of sight and mind as far as the American public was concerned. Few questioned, or even cared about, the military justice system.

In the late Nineteenth Century, a few efforts to reform the military justice system arose. Some changes in procedure, such as allowing an accused to have counsel present in the court-martial (and, later, allowing counsel to speak!) developed in the late nineteenth century.¹⁰

For the most part, however, reformers sought not so much to change the system as to establish military justice as a system of jurisprudence. The aim was to codify and explain existing practice, rather than to create new procedures. Modest though this goal may seem, it would eventually have the effect of standardizing of procedures and defining limits (albeit very broad ones) to commander's powers, and of providing a more solid platform for Twentieth Century reforms. William Winthrop's epic, *Military Law and Precedents*, in 1886 was the leading example of such efforts; Winthrop's treatise remains today a treasure of history and Nineteenth Century practice. The precursors to the *Manual for Courts-Martial* also appeared during this period.¹¹

World War I generated greater interest in changing the system. In 1917, thirteen black soldiers were hanged for mutiny in a mass execution conducted one day after their trial ended. The case drew national attention, and in January 1918 the Army established the first system of appellate review in the military. Henceforth, capital and certain other sentences and

7. See COFFMAN, *supra* note 6, at 15, 136, 329, 401. Enlisted men were described by their officers as "the bottom rung of society" and "the refuse of mankind." *Id.* at 16. See also ALLAN R. MILLETT & PETER MASLOWSKI, *FOR THE COMMON DEFENSE* 140, 163, 277 (1994).

8. Even a great leader like George Washington believed that corporal punishment was essential to motivate men; he advocated raising the maximum number of lashes from 39 to 500, but had to settle for a maximum of 100. CHARLES ROYSTER, *A REVOLUTIONARY PEOPLE AT WAR* 216 (1979).

9. See COFFMAN, *supra* note 6, at 3, 40, 162, 222; MILLETT & MASLOWSKI, *supra* note 7, at 655; STEPHAN HOWARTH, *TO SHINING SEA: A HISTORY OF THE UNITED STATES NAVY 1775-1998*, 96-97, 130-131 (1999).

10. See JAGC HISTORY, *supra* note 4, at 90. See also COFFMAN, *supra* note 6, at 377.

11. The first *Manual for Courts-Martial* was written by A. Murray and published in 1993. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES, A21-1* (1998).

could not be executed until after review in the Office of the Judge Advocate General.¹²

The War brought other pressures on the military justice system. The modern Selective Service System was adopted.¹³ This system eliminated many of the inefficiencies and inequities of the Civil War draft and ensured that the large force assembled for the war would more closely resemble a cross-section of America.¹⁴ Because a broader cross-section of America was subject to military justice led to more criticism of it.

The most important critic was Brigadier General Samuel T. Ansell, Acting The Judge Advocate General. Ansell called for a number of reforms, including expanded appellate review and procedures more closely paralleling those in civilian criminal trials. Unfortunately for Ansell, his boss, Major General Enoch Crowder, The Judge Advocate General (but detailed as Provost Marshal General during the war), opposed most of Ansell's suggestions.¹⁵ Given Crowder's opposition, and that of others,¹⁶ Ansell made little headway. With the United States' rapid demobilization and retreat into isolationism after the war, interest in reforming military justice subsided.

World War II rekindled such interest. Over sixteen million men and women served in the armed forces during World War II—nearly one in eight Americans. There were over two million courts-martial.¹⁷ Many people, from all walks of life, were exposed to the military justice system, and many did not like what they saw. The system appeared harsh and arbi-

12. JAGC HISTORY, *supra* note 4, at 129-30.

13. The person given most credit for devising the system is Major General Enoch Crowder, who was Judge Advocate General and acting Provost Marshal during the war. DAVID A. LOCKMILLER, ENOCH H. CROWDER, SOLDIER, LAWYER, AND STATESMAN 152-62 (1955).

14. During the Civil War, the wealthy and privileged were often able to secure commissions as officers or to buy their way out of service altogether, so that even during the war enlisted ranks were predominantly populated with immigrants and the underprivileged. *Id.* See also MILLETT & MASLOWSKI, *supra* note 7, at 163.

15. See JAGC HISTORY, *supra* note 4, at 113-36; JONATHAN LURIE, ARMING MILITARY JUSTICE, THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS 1775-1950, at 113-36 (1992).

16. The eminent law professor, Henry Wigmore, was an outspoken critic of Ansell's proposals. JAGC HISTORY, *supra* note 4, at 130-31. Secretary of War Baker was also solidly in Crowder's corner. LOCKMILLER, *supra* note 13, at 202-06.

17. Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972).

trary, with too few protections for the individual and too much power for the commander. To Americans who were drafted or who enlisted to defend their own freedoms and protect those of others around the world, this was unacceptable and complaints and criticisms became widespread. Even before the war was over, the Secretary of War and the Secretary of the Navy each commissioned studies of the system, and those studies recommended significant, if not fundamental change.¹⁸

After the war, interest in reforming the system continued, and Congress became involved. In 1948, Congress passed the Elston Act,¹⁹ amending the Articles of War.²⁰ These amendments were based on studies and recommendations made by the Army and foreshadowed some of the changes that would be contained in the UCMJ, including an increased role for lawyers in courts-martial. However, other dynamics led immediately to efforts for further change.

By 1948, it was clear the United States would have to act as guardian of freedom in the world, and that the peacetime size and roles of the armed forces would be unprecedented. The defense infrastructure itself had just been reorganized, with the creation of a separate Air Force, and the establishment of the Department of Defense. This led to a perceived need for greater protections for men and women who would serve in the armed forces, and to a desire for a common system for all the services.

Thus, no sooner had the Elston Act been enacted than Secretary of Defense Forrestal appointed a committee, in the summer of 1948, to draft a uniform code of military justice. As chair of the committee, Secretary Forrestal appointed Harvard Law professor, Edmund Morgan. Professor Morgan had served as a major in the Army's Judge Advocate General's Corps in World War I. He served on the staff of the General Samuel Ansell, whose proposals to reform the military justice system had been rejected. Now, in 1948, General Ansell's protégé, Professor Morgan, would dust off many of those proposals.

18. See LURIE, *supra* note 15, at 130-49.

19. Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948).

20. The Elston Act, named for its sponsor, Congressman Charles Elston of Ohio, was the subject of considerable debate in the Senate. Some senators objected to amending only the Articles of War and not the Articles for the Government of the Navy. Others, however, refused to support continuation of selective service unless the military justice system was improved and demanded passage of the Elston measures as the best available package at the time. The latter group prevailed and the Elston Act became law when President Truman signed the selective service act. See LURIE, *supra* note 15, at 153-56.

The other three members of the committee were the under or assistant secretaries of the three services. They were assisted by a working group of military and civilian attorneys in the Office of the Secretary of Defense. This group considered the various reports that had been prepared by the services and other groups as it worked. It is interesting, however, in light of modern-day discussions about how open the process of proposing changes should be, that the Morgan committee worked in almost complete secrecy. Its drafts were not circulated outside the Defense Department (with the exception of some consultation with key congressional staff) before the final package was presented to Congress in early 1949. There were, of course disagreements during the drafting process, and not all the services, or all the judge advocates general, supported every provision in the final package. Secretary of Defense Forrestal resolved disputes.²¹

The House of Representatives held about three weeks of hearings in the spring of 1949. These included an article-by-article review of the proposed code. The Senate held a more perfunctory three days of hearings a few weeks later. These hearings form the basis for one of the best and most informative pieces of legislative history anywhere. Congress ultimately passed the proposal with relatively few major changes, and President Truman signed it on 5 May 1950.²² It was to take effect on 31 May 1951. No one knew it when the President signed it, of course, but that meant that the sweeping changes made by the new code would be implemented during the height of the Korean War—a formidable task for the judge advocates of the day.

The UCMJ marked a distinct, but not complete, break with the past. Most significant was its acceptance of the idea that discipline cannot be maintained without justice, and that justice requires, in large measure, the adoption of civilian procedures. The new Code was an effort to combine elements of two competing models: the old command-dominated military justice system and the civilian criminal justice system with its heavy emphasis on due process. The drafters of the Code recognized that the unique purpose and organization of the armed forces necessitate special rules and procedures for dealing with unlawful acts (and, indeed, in defining what is unlawful). The unique authority and responsibilities of commanders, the need for effective and efficient procedures in a wide range of places and circumstances, including combat, and the critical importance of obedience of orders and adherence to standards of conduct all distinguish

21. See LURIE, *supra* note 15, at 150-92.

22. Pub. L. No. 81-506, 64 Stat. 108 (1950).

military society from the society at large. At the same time, the drafters believed that procedures designed to ensure fairness and the perception of fairness are not antithetical, but essential, to discipline in the armed forces. In the words of Edmund Morgan, “We were convinced that a Code of Military Justice cannot ignore the military circumstances in which it must operate but we were equally determined that it must be designated to administer justice.”²³

The new system retained many features of the old, including considerable authority for the commander,²⁴ but attempted to limit the commander’s authority and to balance it with a system of somewhat independent courts and expanded rights for service members. The creation of the Court of Military Appeals was designed to protect the independence of the courts and the rights of individuals. Judge advocates were to play a bigger part in the process. The role of The Judge Advocate General was expanded, including broader responsibility to oversee the system under Article 6. The staff judge advocate had increased responsibilities in advising convening authorities and assisting in the review of cases. The position of law officer—the forerunner to the military judge—was established to act in general courts-martial. The accused was afforded the right to be represented by a qualified attorney—a judge advocate—in general courts-martial. A parallel right would not be recognized in civilian criminal trials until the Supreme Court decided *Gideon v. Wainwright*²⁵ some twelve years later. Similarly, the new code provided protections against self-

23. *Hearings on H.R. 2498 Before a Subcomm. Of the House Armed Services Comm.*, 81st Cong., 1st Sess., at 606 (1949) (statement of Professor Edmund G. Morgan).

24. Under the Code, commanders retained core functions they still exercise today: the power to convene (i.e., call into being) a court-martial and to decide what charges against which accused will be referred to it (i.e., tried by it). They also had, as they do today, the power to select court members (the “jury”), and the power to disapprove findings of guilty and to disapprove, reduce, or suspend an adjudged sentence. Commanders also had many powers that have since been abolished or modified. These included the power to appoint the law officer (later “military judge”) and the trial and defense counsel, the power to decide what witnesses would be produced at government expense and whether deposition testimony might be taken, and the power to rule on interlocutory questions and, in some instances, to overrule the law officer or military judge. In addition to the powers commanders exercised as convening authority, commanders and other officers played a much more expansive role in courts-martial. Special courts-martial were typically conducted entirely by non-lawyer officers, with line officers serving as prosecutor and defense counsel and the members ruling on issues of law. Even in general courts-martial, where counsel were judge advocates and a law officer presided, all sessions had to be held in the presence of the members, and many of the law officer’s rulings were subject to a final decision by the members.

25. 372 U.S. 335 (1963).

incrimination that predated the Supreme Court's decision in *Miranda v. Arizona*²⁶ by over fifteen years.

The UCMJ was a bold step. Perhaps measured against today's standards the Code of 1950 looks somewhat tentative. Measured against what it replaced—after 175 years—the Code of 1950 was a daring leap into uncertain waters. There was substantial consensus that the Articles of War and Articles for the Government of the Navy—products of times when the armed forces were small and insulated—could not meet the needs of large forces in the post-war environment. It remained to be seen how their replacement would actually function.

II. Military Justice Under the Uniform Code of Military Justice.

The history of military justice under the UCMJ can be divided into three periods. In the first, from 1950 to 1969, the system went through a period of “feeling out” and early growth. During this period, the Code's various components were tested for functionality and compatibility. Although the new Code worked well enough, by the late 1960s it needed some major adjustments. These occurred in the Military Justice Act of 1968, leading to the second period, from 1969 to 1987. This period saw considerable turmoil but ultimately resulted in a “reaching of age” for military justice. Since 1987, the system has enjoyed the fruits of that maturity and relative stability.

A. 1951-1969: The Struggle for Definition.

The new Code provided the outlines of a new system, but it left many questions unanswered. How those questions would be answered and, equally important, who would answer them, dominated the early years under the Code. Commanders, the Judge Advocates General, and the Court of Military Appeals endeavored to define their new roles.

The UCMJ did not purport to prescribe a comprehensive set of rules for military justice. The Code authorized, as it does today, the President to fill in many of the gaps.²⁷ Pursuant to these powers, the President issued

26. 384 U.S. 436 (1966).

27. See, e.g., UCMJ arts. 36, 56 (2000).

Executive Order 10,214, prescribing the *Manual for Courts-Martial, 1951*. The *Manual* prescribed rules of evidence and procedure, maximum punishments, and forms. Written in a narrative format, it also provided helpful guidance, because commanders and other non-lawyers frequently had to apply the rules and process cases without benefit of legal advice.²⁸

The *Manual* was drafted within the Defense Department. It drew its format and much of its text from predecessor *Manuals for Courts-Martial*. It modified previous language to conform to the new Code, but in cases of gaps or doubts about the meaning of the Code, the new *Manual* tended to adopt preexisting standards. Whether as a result of intent or natural human inertia, the new *Manual* could be viewed as restraining some of the revolutionary characteristics of the new Code. This set the stage for some early battles.

When the Court of Military Appeals was established, its role was viewed primarily as “error-correction.” The Court, independent from command pressures, would ensure that cases it reviewed had been fairly tried. Nevertheless, inherent in the Court’s functions was law-interpretation and hence, to some degree, lawmaking. More than its error-correction function, this ability to define the rules for military justice was truly unprecedented. It made the system far more dynamic than previously, when change occurred only sporadically by legislation or formal rule making. And, of course, it infringed on the traditional authority of those responsible for such rules: the military departments, and particularly, the Judge Advocates General.

The Court of Military Appeals invalidated a number of *Manual* provisions during the 1950s on grounds they were inconsistent with the UCMJ. Perhaps the most noteworthy of these cases was *United States v. Rinehart*,²⁹ decided in 1957. In *Rinehart*, the court overturned a long-standing practice and invalidated a *Manual* provision authorizing court members to consult the *Manual for Courts-Martial* during their deliberations. In so doing, the court pointed to no specific provision in the Code that prohibited this procedure, but interpolated from several codal provisions in order to strike it down. The court’s action reflected its willingness to attack the status quo in pursuit of its own vision and what it thought Con-

28. It is worth remembering that during this time, only general courts-martial were always conducted with attorneys. See discussion *supra* note 24.

29. 24 C.M.R. 212 (C.M.A. 1957).

gress wanted: a military justice system that more closely mirrored civilian criminal procedure.

The court did not limit itself to interpreting the Code in order to discard old procedures or fashion new ones, but it cast about in search of a doctrine for doing so. In the early 1950s, it relied on the broad (arguably limitless) concept of “military due process.”³⁰ It should be noted, that at this time, no decision of the Supreme Court had ever recognized that service members enjoy constitutional protections, so the Court of Military Appeals’s uncertainty was understandable. Gradually, the court overcame its reluctance to ground protections for accused service members in constitutional rights, however, and in 1960 it expressly recognized that accused service members enjoy constitutional protections.³¹ In so doing, the court was able to establish or extend the rights of service members beyond those expressly recognized in the Code.³²

The court’s decisions casting aside venerable practices and extending the rights of the accused did not meet with universal approval. By the early 1960s the Judge Advocates General were sufficiently dissatisfied with the court that they declined to collaborate on the annual report that is required by the code. More importantly, there were even some calls from the services to abolish or radically alter the court.³³

The services were not always resistant to change, however. In November 1958, The Judge Advocate General of the Army, Major General Hickman, secured approval to create the U.S. Army Field Judiciary. Under this order, Army law officers, judges, were assigned directly to The Judge Advocate General, rather than to local commanders as had been the case.

30. See, e.g., *United States v. Clay*, 1 C.M.R. 74 (C.M.A. 1951).

31. *United States v. Jacoby*, 29 C.M.R. 244 (C.M.A. 1960). During the 1950s the Supreme Court seemed to suggest that at least some constitutional protections extend to service members. See *Burns v. Wilson*, 346 U.S. 137 (1953). See generally Captain John T. Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 MIL. L. REV. 27 (1972).

32. In *Jacoby*, the Court held that the Sixth Amendment right of confrontation applies in courts-martial; in so doing the Court overruled its own earlier decisions which, construing Article 49 more narrowly, had permitted the admission of written interrogatories taken without opportunity for the accused to confront the witnesses. *Jacoby*, 29 C.M.R. at 244. See *United States v. Tempia*, 37 C.M.R. 249 (C.M.R. 1967) (holding that warning requirements prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966) apply in courts-martial).

33. See JONATHAN LURIE, *PURSuing MILITARY JUSTICE, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980*, at 154-56 (1998).

This major step toward increased judicial independence occurred more than ten years before Congress required such independence in Article 26.

Although military justice under the UCMJ seemed much improved during this period, it remained significantly different from civilian criminal justice. The Court of Military Appeals weathered the attacks upon it and established its role as the primary interpreter of the Code and the protector of fairness of the system. Despite the court's efforts, the Code itself limited how independent and judicial courts-martial could be.³⁴ Thus, the military justice system was still seen as vastly different—and inferior. This was nowhere better highlighted than in the Supreme Court's decision in *O'Callahan v. Parker*³⁵ in 1969. There the Court limited the jurisdiction of courts-martial over service members by requiring that offenses be “service connected” to be subject to court-martial jurisdiction. Moreover, the Court roundly criticized courts-martial, saying: “courts-martial are singularly inept in dealing with the nice subtleties of constitutional law.”³⁶ *O'Callahan* reflected that, despite many advances, military justice still had far to go if it was to be perceived as a true system of justice.

O'Callahan was decided on 2 June 1969, and brings to a close this first period under the UCMJ. Ironically, the military justice system was already primed to undergo major changes that would do much to dispel such criticisms. The Military Justice Act of 1968,³⁷ was scheduled to go into effect on 1 August 1969. This began the second period in the history of military justice, from 1969 to 1987.

B. 1969-1987: Judicializing the Military Justice System.

The original UCMJ was revolutionary in concept. The Military Justice Act of 1968 was revolutionary in content. The original Code broke with the command-dominated system of the past, but left the commander with many powers and failed to give courts-martial sufficient independence and authority to balance those powers effectively. The Military Jus-

34. See discussion *supra* note 24.

35. 395 U.S. 258 (1969).

36. *Id.* at 265.

37. Pub. L. No. 90-632, 53 Stat. 1335 (1968).

tice Act of 1968 substantially increased the independence of courts-martial and the prestige and authority of the military judiciary.

The Military Justice Act of 1968 was the product of several years of study, debate, and compromise, within the Department of Defense and in Congress. No one was more responsible for securing Department of Defense backing and Congress's approval of the Act than Army The Judge Advocate General Major General Kenneth Hodson. Senator Sam Ervin was a crucial sponsor in Congress. In effect, the Military Justice Act of 1968 pronounced a success the theory of balancing command authority with procedural protections and judicial authority, and adjusted the balance in favor of the latter.

The act provided the foundation for the system of judicial authority and relatively independent courts that we take for granted today. Among other things, the Act made the boards of review "courts" of review and gave them powers to act like true appellate courts. It changed the name of the law officer to military judge and extended more judicial authority to the position. It provided for military judges to preside in special as well as general courts-martial. It provided for trial by military judge alone on request by the accused. And it provided for the Article 39(a) session at which the judge could hear and decide issues outside the presence of the members. Finally, it required that military judges be assigned and directly responsible to the Judge Advocate General or a designee.

It is worth noting that the Military Justice Act of 1968 and the new *Manual for Courts-Martial* that accompanied it became effective while the war in Vietnam was intense. Once again, judge advocates faced and met great challenges in implementing new procedures in a combat environment.

In the 1970s, the services and the military justice system went through a difficult period. The war in Vietnam ended unsuccessfully, the services were drawn down, the draft was terminated, and reductions in force implemented. Morale suffered and the quality of the force was poor; court-martial rates were astronomical by today's standards. In the late 1970s and early 1980s, the services initiated a number of efforts to improve recruiting, quality of life, morale, and discipline—the success of these was demonstrated in Operations Desert Shield and Desert Storm in 1990 and 1991.

Military justice went through a parallel development as it coped with these broader problems and addressed issues of its own.

From 1975 to 1978, the Court of Military Appeals engaged in what was sometimes called the “COMA revolution.” It issued a number of controversial and often criticized decisions that limited the jurisdiction of courts-martial, limited the powers of commanders, expanded individual rights, extended the court’s own authority, and broadened the authority and responsibility of the military judge.³⁸ Some of the more problematic of the court’s initiatives were later reversed, either by Congress or by the court itself.³⁹ Nevertheless, the court left two lasting legacies. First, its decisions enhancing judicial powers have remained effective and have ensured that the goals of judicial authority and independence in the Military Justice Act of 1968 would be realized. Second, the court helped serve as the catalyst for judge advocates and others to examine critically the system and to consider ways to improve it. This led to several important steps.

In 1977, the services began a process culminating in 1980 with the adoption of the Military Rules of Evidence—a slightly modified version of the Federal Rules of Evidence. This was largely the initiative of Army Colonel Wayne Alley, at the time the Chief of the Criminal Law Division in the Office of The Judge Advocate General. In 1979 through 1981, The Judge Advocate Generals Wilton Persons and Alton Harvey tested and adopted an independent defense organization, the Trial Defense Service (TDS). This was quite controversial at the time, but for twenty years TDS has done vital work, serving soldiers and the credibility of the military system superbly.⁴⁰ The Military Justice Act of 1983⁴¹ streamlined pretrial and post-trial processing, and abolished what had become the formalistic (but potentially pernicious) practice of having the convening authority detail judges and counsel to courts-martial. Most importantly, it extended the jurisdiction to the Supreme Court to direct review of Court of Military Appeals decisions on certiorari. The *Manual for Courts-Martial, 1984*, tied all these developments together. The new *Manual* also discarded the narrative structure of previous *Manuals*. Rules, that is, binding requirements, were embodied in numbered rules, while other information and guidance was clearly indicated as such. Although still written so that a

38. See John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977).

39. See generally LURIE, *supra* note 33, at 230-71.

40. The Air Force adopted a separate defense counsel system in 1974. The Navy and Marine Corps adopted similar structures in the mid-1990s.

41. Pub. L. No. 98-209, 97 Stat. 1393 (1983).

non-lawyer could use it, the new *Manual* recognized that the increased sophistication of military justice meant that lawyers would invariably be needed for its administration.

This period concludes with the Supreme Court's decision in 1987 in *Solorio v. United States*.⁴² There the Supreme Court overturned *O'Callahan* and held that courts-martial may exercise jurisdiction over service members without the service connection test. The majority opinion did not rely on the many changes in military justice under the UCMJ as a basis for the decision, citing rather to history and Congress's constitutional powers. Nevertheless, it is likely that the changes in military justice under the UCMJ made it easier for the majority to reach its result, and they surely made it easier for Congress and the public to accept the result in *Solorio*.

The Military Justice Act of 1968, the Court of Military Appeals' activism of the 1970s and its more measured vigilance in the 1980s, Congress' refinements in 1979 and 1983, the President's complete revision of the Manual 1984, and various improvements developed within the Defense Department resulted in a mature military justice system by 1987. It retained a central role for commanders, but more effectively balanced that role with sophisticated procedural rules and a relatively robust and independent judicial system.

C. 1987-Present: Maturity and Stability.

From 1987 to the present, the military justice system has enjoyed a period of stability and incremental change. This is good because the armed forces have undergone their own turbulence during this period following the end of the Cold War. The size of the armed forces was substantially reduced and their missions, organization, and doctrine have undergone almost continual reexamination in order to meet the nation's changing national security requirements. During this period, Congress has engaged only in minor changes—requiring the imposition of forfeitures in most instances,⁴³ the cosmetic changes of the names of our appellate courts,⁴⁴ and the expansion of the jurisdiction of special courts-martial.⁴⁵ The Court

42. 483 U.S. 435 (1987).

43. Pub. L. No. 104-106, Div. A, Title XI, § 1121(a), 110 Stat. 462, 463 (1996).

44. Pub. L. No. 103-337, Div. A, Title IX, § 924(c), 108 Stat. 2831, 2832 (1994).

45. Section 577, National Defense Authorization Act for Fiscal Year 2000 (amending Article 19 of the UCMJ).

of Appeals for the Armed Forces has not undertaken radical redefinition, but has rather engaged in error-correction and in dealing with novel questions facing many courts, such as issues of scientific evidence⁴⁶ and the internet.⁴⁷ One significant change occurred in 1998, when, almost exactly forty years after Major General Hickman established the U.S. Army Field Judiciary, Major General Huffman took the important step of recognizing tenure for Army trial and appellate judges under *Army Regulation 27-10*.

The maturity of the system is reflected in decisions of the Supreme Court. The Supreme Court recognizes that military justice is different from the civilian justice system in important respects.⁴⁸ Nevertheless, the Court's decisions indicate increased respect for military justice as a system of justice. This was especially evident in Justice Ginsburg's concurring opinion in *Weiss v. United States*:

The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards behind when they enter military service. Today's decision upholds a system notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally-trained officers preside or even participate as judges.⁴⁹

This stability has served the military justice system well because the system has been subject to particular scrutiny in recent years. The Tailhook scandals, terrible accidents like the friendly fire downing of two Army helicopters in Iraq, and the Italian cable car gondola crash caused by a Marine aircraft, and several high-profile sexual harassment and adultery cases have focussed attention on military justice. The system has seemingly fared well in the public's eyes through this period. This is a testament to the UCMJ and the people who administer it.

46. See, e.g., *United States v. Scheffer*, 44 M.J. 442 (1996), *reversed*, 523 U.S. 303 (1998).

47. See *United States v. Maxwell*, 45 M.J. 406 (1996).

48. See, e.g., *United States v. Scheffer*, 523 U.S. 303 (1998); *Loving v. United States*, 517 U.S. 748 (1996).

49. *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J. concurring).

III. Assessing the Uniform Code of Military Justice and Guessing Its Future

The enactment of the UCMJ in 1950 was a seismic event. It occurred because the old system had changed too slowly to meet the requirements of Twentieth Century America and its armed forces. The old system gave too much power to commanders and too little assurance of due process and fairness to America's sons and daughters in service to be acceptable. The new Code responded to these problems by limiting command authority and balancing it with due process and judicial authority.

The Code's development over the last fifty years has centered on refining that balance. The command function of deciding when to invoke the military justice process has been retained, but the commander's ability to affect the workings of that process has been significantly reduced—by legislation, executive order, judicial decisions, and practice. Procedures have become much more sophisticated, and judicial authority and independence has grown.

This process of refinement demonstrates another important difference in military justice before and after the Code. The new system is more dynamic. The creation of the Court of Military Appeals/Court of Appeals for the Armed Forces, the expansion of the role of the Judge Advocates General and other lawyers, and, lately, direct review by the Supreme Court resulted in ongoing interpretation of the rules and more frequent critical examination of military justice, at least from within the armed forces.⁵⁰ The Department of Defense has institutionalized constant review of the system in the form of the Joint Service Committee on Military Justice. Thus, the system under the Code has enjoyed a healthy climate for adjustment and change. The absence of this led to the extinction of the preceding system.

There is cause to celebrate the Code. It has been a huge success. The absence of serious criticism of military justice, the system's apparent acceptance by judges, Congress, and the President, and the success of our

50. In recent years, there has been relatively little interest in military justice in Congress or in the public. In one sense, this may be a healthy sign of satisfaction with the system. Nevertheless, this disinterest is also unfortunate for two reasons. First, outside interest can expand horizons and the dialog, so that possible changes are more fully identified and vetted. Second, it probably also results in less understanding of the system, so that, when the system is scrutinized or questioned, examination of suggested changes is likely to be less well informed and the potential for harmful change increased.

armed forces in a wide range of missions are evidence of that success. We should applaud the vision and courage of those who drafted and enacted the UCMJ, and the dedication and wisdom of those who have amended it, interpreted it, and applied it for fifty years.

Still, it presumes too much to suggest that we have arrived at a perfect instrument. Changes in the world, in our society, and in the armed forces will inexorably pose new questions about the military justice system. If the Code is to continue to serve as the backbone of the system, the Code and the system must continue to evolve. All who are concerned with military justice, especially judge advocates, must take an interest in that evolution. This begins with applying the Code competently and fairly, but does not end there.

I have elsewhere suggested a number of areas of potential change or areas that at least deserve reexamination.⁵¹ Other observers of military justice will no doubt identify other areas of potential improvement. Of course, not every suggestion is necessarily a good idea, but judge advocates and others should not shy from critically examining the system. Even if the status quo is the best alternative, it is better defended after penetrating analysis than with knee-jerk reaction.

Judge advocates must be stewards of the system and true to the principles that have been the foundation of the UCMJ since its creation. The military justice system is about maintaining discipline *and* delivering justice. This is not an either-or proposition. A system that fails to protect adequately the rights of those accused of misconduct will undermine discipline just as will a system that fails to enforce the rules and protect the law abiding. In either case, the system's failure will eat away at morale, at mutual trust, and respect for authority. A system that does not take painstaking care to assess guilt or innocence carefully and to punish fairly and appropriately is a system that is not tied to accountability. Accountability is at the heart of discipline.

The military justice system enforces standards and reinforces values by the consistent application of two basic principles: each soldier, sailor, airman, or Marine, regardless of rank is responsible and accountable for

51. See John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 18-29 (1998); John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 1, 4-6.

his actions. And, each soldier, sailor, airman, or Marine, regardless of circumstance, is entitled to be treated fairly and with dignity and respect.

Commanders and judge advocates must appreciate the history and role of military justice if they are to administer it properly and nurture its growth appropriately. If they do, then in 2050 their successors will commemorate the one hundredth anniversary of the UCMJ with the same pride and satisfaction we feel today on its fiftieth anniversary.

**OBSERVATIONS ON THE UNIFORM CODE OF MILITARY
JUSTICE:
1954 AND 2000**

Editor's Note: In 1954, then-Major George S. Prugh wrote his observations on the Uniform Code of Military Justice (UCMJ). At that time, the UCMJ was relatively new law; its success was still being tested and the public was still critical of military justice. In 2000, Major General (Ret.) Prugh reflected upon the fifty years of military justice since the UCMJ was passed. His observations from 1954 and 2000 are combined here as one article.

OBSERVATIONS: 1954¹

MAJOR GEORGE S. PRUGH, JR.²

In the periods immediately following World Wars I and II there arose in some parts of the press and the legal circles a considerable agitation concerning the system of military justice in operation in the war time armies numbering millions of American citizens.³ During World War II about 13,000,000 men had seen service in either the Army or the Navy, and of this number about 147,000 were tried by general courts-martial. At its peak, in October 1945, the Army's prison population counted five men for every one thousand servicemen.⁴ Any system of justice—military or otherwise—was bound to be carefully scrutinized when such significant numbers were being affected. Although there was little comment during the actual war years, as peace descended the passions cooled, memories of the fighting dimmed, and the public appeared to become compassionate

1. Reprinted from the Fall 1954 issue of *The Brief*, with permission of the International Legal Fraternity of Phi Delta Phi.

2. At the time this article was written, now-Major General (Ret.) Prugh was a major in the Judge Advocate General's Corps. A.B., 1941, University of California; LL.B. 1948, University of California. Member of the Bars of California, the U.S. Supreme Court, and the Court of Military Appeals.

3. See Harold F. McNiece & John V. Thornton, *Military Law from Pearl Harbor to Korea*, 22 *FORDHAM L. REV.* 155 (1953); Alexander Holtzoff, *Administration of Justice in the United States Army*, 22 *N.Y.U. L.Q. REV.* 1 (1947).

4. THE ADJUTANT GENERAL, U.S. DEP'T OF ARMY, *THE ARMY CORRECTIONAL SYSTEM* 92 (Jan. 1952).

toward those servicemen who languished in the various confinement facilities serving sentences imposed by courts-martial. Attention was directed not so much to those convicted of civilian-type crimes as it was to those convicted of the so-called military offenses, constituting about two-thirds of the servicemen who were serving confinement.

The American civilian saw little criminality in the military offenses, which have no true counterpart in the civilian justice system although these offenses were made crimes, many carrying extreme penalties, by the laws of the United States. He forgot that the standards of civilian criminal procedure cannot be applied absolutely to military courts,⁵ and he failed to recognize that “the degree of punishment imposed by a court-martial is closely connected with the maintenance of discipline in the command.”⁶ The maintenance of discipline was, with the advent of peace, of little importance to the civilian. The words of Secretary of War Robert Patterson remained largely unnoticed, when he wrote in the *Tennessee Law Review* in 1945 that “an army without discipline is a mob, worthless in battle,”⁷ for of course it was not long afterwards that the battles were over and the troops were returning to be civilianized.

Some observers noted that the military justice system operating during World War II resulted in few, if any, convictions of the innocent, and few, if any, acquittals of the guilty, clearly the goal of any system of criminal law.⁸ But such plaudits were overwhelmed by the denunciations of *command control*—courts obedient to the whim of a military commander—and *excessive sentences*.

In 1944, a general could order into battle millions of men, a high percentage of whom faced certain death. In 1946 the public began to doubt the wisdom of permitting that same general to act in matters of military justice, regardless of the relationship of justice to discipline, and discipline, in

5. *Kirkman v. McClaughry*, 160 F. 436 (CCA 8th 1908) (citing Porret’s case, Perry’s Oriental cases); Albert R. Mugel, *Military Justice, Command, and The Field Soldier*, 2 BUFF. L. REV. 183 (1952-53).

6. Benjamin Feld, *The Court-Martial Sentence: Fair or Foul?*, 39 VA. L. REV. 319, 321 (1953).

7. Robert P. Patterson, *Military Justice*, 19 TENN. L. REV. 12 (1945-47).

8. Kenneth C. Royall, *Revision of the Military Justice Process as Proposed by The War Department*, 33 VA. L. REV. 269, 270 (1947). The War Department Committee on Military Justice [The Vanderbilt Committee] reported that it had been unable to find in an authenticated case that an innocent man had been convicted. JAGF 1946/8221 (on file with the Office of The Judge Advocate General).

turn, to victory in battle. The soldier at the Rapido or the Bulge or Okinawa thought no punishment was too severe for the shirker or deserter, but some civilians who had fought the war vicariously appeared to express horror at the long sentences courts-martial were imposing. A few excesses and abuses were seized upon to demonstrate the failure of the military to dispense justice. Without noting that almost invariably the same cases were being cited repeatedly as such examples, the “public” demanded “reform”—and “reform” it got. The story has been told too often and too well to be repeated in the limits of this article⁹—how committees were appointed to examine and report, how the Elston Act¹⁰ became the law for the Army, how “unification” was achieved, and how the Uniform Code of Military Justice was enacted into law.¹¹

Now, it seems apparent that any American code of military justice must serve a dual purpose: (1) it must establish a framework whereby offenders are appropriately and promptly punished by means of an enlightened procedure fully in accord with the basic principles of American justice; (2) while at the same time, not only not impeding, but on the contrary, aiding the military commander in accomplishing his assigned mission.¹² Traditionally, but mistakenly, the scheme of military justice was said to rest primarily upon the second of these purposes, being defined as a system for the maintenance and enforcement of good order and discipline in the armed forces, or as simply “an instrumentality of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein.”¹³

The new Code clearly re-affirmed the congressional and military intent of long standing that American military justice must rest equally upon both bases.¹⁴ The Court of Military Appeals in an early case announced that “we believe Congress intended, insofar as reasonably pos-

9. Robert S. Pasley & Felix E. Larkin, *The Navy Court-Martial: Proposals for its Reform*, 33 CORNELL L.Q. 195 (1947); Mandeville Mullally, Jr., *Military Justice: The Uniform Code in Action*, 53 COLUM. L. REV. 1 (1953); Arthur E. Farmer & Richard H. Wels, *Command Control or Military Justice*, 24 NYU L.Q. REV. 263 (1949); George L. Russell, *The Uniform Code of Military Justice*, 19 GEO. WASH. L. REV. 233 (1950).

10. Act of 24 June 1949, 62 Stat. 627.

11. Act of 5 May 1950, ch. 169, 64 Stat. 108.

12. See Chester Ward, *UCMJ—Does It Work*, 6 VAND. L. REV. 186 (1953).

13. 1 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 40 (2d ed. 1920 Reprint).

14. *Report of Hearings Before a Subcomm. on Armed Services, House of Representatives, 1st Session, 81st Congress on H.R. 2498*, at 606 (1940) (statement of Professor Edmund M. Morgan, Jr., Harvard University Law School).

sible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system."¹⁵ Although it may sound as if the Code thereby established a very fundamental change in the philosophy behind military justice, the foregoing language of the Court of Military Appeals is hardly different from that expressed over half a century ago by Colonel Winthrop, one of the leading authorities on military law, when he wrote that a court-martial is "so far as it is a court at all, and within its field of action, as fully a court of law and justice as is any civil tribunal . . . it is bound, like any court, by the fundamental principles of law."¹⁶

Nevertheless, regardless of the rationale, the Code made certain drastic changes in the procedures of military justice. It established a more or less uniform system for all of the armed forces, designed to function in both peace and war; created a sort of civilian "supreme military court" to place the seal of judicial sanction on interpretation of the law; engrafted many civilian legal practices to the military; and made the part of lawyers more prominent in every phase of the system. Space is not here available for a detailed study of the provisions of the Code.¹⁷ Suffice it to say that almost without exception the changes tended to complicate a simple system beyond reason and, while purporting to increase the safeguards afforded an accused, permitted the escape of the guilty through a multiplication of legal loopholes that reflected the ascendancy of form over substance. The Code met with almost universal approval, although a few observers felt that it did not go far enough to eliminate command influence.¹⁸ Only a few voices were heard to express doubts that the system would work.¹⁹

Now, from the vantage point of three years of the Code's operation, tested in some measure by the Korean police action, we are in a fair posi-

15. *United States v. Clay*, 1 C.M.R. 74, 77 (C.M.A. 1951).

16. WINTHROP, *supra* note 13, at 54, 55.

17. See F.B. WIENER, *THE UNIFORM CODE OF MILITARY JUSTICE* (1950); DANIEL WALKER, *MILITARY LAW* (1954); JAMES SNEDEKER, *MILITARY JUSTICE UNDER THE UNIFORM CODE* (1953); Bernard Landman, Jr., *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 *STAN. L. REV.* 491 (1951-52).

18. Note, *Can Military Trials be Fair?*, 2 *STAN. L. REV.* 547, 558 (1950); JAMES SNEDEKER, *THE UNIFORM CODE OF MILITARY JUSTICE*, 38 *GEO. L.J.* 521, 597 (1950); Note, *The Proposed Uniform Code of Military Justice*, 62 *HARV. L. REV.* 1377, 1379 (1949).

19. WIENER, *supra* note 17.

tion to make some observations about the Code and just how it works in practice.

Anyone evaluating the Code must consider that a primary purpose of the framers of the Code was to create a system that would be regarded with favor by the public, which would earn and hold the public's confidence. In this respect all indications are that the Code is performing well. For example, examination of law review articles over the past few years clearly reveals a trend away from the blanket and ill-considered condemnations of "drumhead justice" and toward scholarly examinations of the legal problems dealt with by Boards of Review and the Court of Military Appeals. Many law schools teach courses in military law today, and various reporting systems carry leading opinions of the Court of Military Appeals. The judges of the Court of Military Appeals reported in 1954:

Experience has shown that as the members of the State and Federal bars and the public generally have become familiar with the scope and effect of the Code, and its beneficent provisions, they have lost many erroneous concepts concerning the abuses supposedly present in military justice. Many lawyers now realize that procedures under the Code afford protection to an accused that compares favorably with that found in civilian courts.²⁰

Another effect of the Code has been the increased participation of military lawyers in the military justice system. There is no doubt that trials by general courts-martial are now conducted in a more professional manner than prior to the Code—with three lawyers serving in the various capacities of law officer and counsel for the accused and for the government, this result was inevitable.

The techniques of practice of this highly specialized form of law, military justice, closely parallel those of the civilian criminal law practitioner. The individual judge advocate officer, assigned to military justice duties, may be expected to present cases, prepare briefs, argue appeals, submit motions, and draft instructions for the court in a manner familiar to civilian lawyers. If assigned as a law officer or member of a Board of Review he

20. ANNUAL REPORT OF UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, 1 JUNE 1952 TO 31 DECEMBER 1953, 15-16 (1953).

functions as a judge, with all of the responsibilities of that important position.

The scholarly debates of questions of law by members of the corps engage the attention of a large segment of the civilian population, as well as the military, through professional and institutional publications. As the civilian gradually realizes that the military practitioner truly represents the highest traditions of the bar, or, perhaps more realistically, as the civilian sees the military practitioner use techniques which have been associated with the civilian lawyer, the prestige of the military lawyer is enhanced. Concomitant is an elevated regard by the civilian for the procedures and practices of military justice.

With respect to the rights of the accused serviceman, there is simply no longer any question but that he stands in a position more favorable than his civilian counterpart.²¹ As has been true since World War I all punitive proceedings against him are subject to automatic review by one or more agencies, and in certain serious cases there may be now as many as six levels which will entertain the accused's case for legal review or clemency consideration (the convening authority, the Board of Review, the Court of Military Appeals, the Secretary of the Department, The President, and the new trial proceeding).

Judge Latimer, in a commencement address at Charlottesville, Virginia, in January 1952, remarked that "if anyone now believes that a court-martial is merely an agency of the commander, and governed solely by his whims, then he is too blind to see what has clearly been spelled out by members of Congress." The Court of Military Appeals has used its strongest language in the few cases that it has had to decide dealing with "command control."²²

The Court of Military Appeals, the unique product of the Code, has diligently acted to protect the safeguards afforded an accused.²³ This has been particularly noticeable in cases involving the right against self-incrimination.²⁴ Critics of the military justice system will find most prof-

21. John B. Barnard, *Uniform Code of Military Justice—A Recommendation*, 26 ROCKY MTN. L. REV. 48-55 (1953-54).

22. *United States v. Littrice*, 13 C.M.R. 43 (C.M.A. 1953); *United States v. Duffy*, 11 C.M.R. 20 (C.M.A. 1953); *United States v. Ferguson*, 11 C.M.R. 251 (C.M.A. 1953).

23. "By adopting these principles we impose upon military courts the duty of jealously safeguarding those rights which Congress has decreed are an integral part of military due process." *United States v. Clay*, 1 C.M.R. 74, 82 (1951-1952).

itable and illuminating a study of the decisions of the court and the boards of review.²⁵

The foregoing statement of the operation of the Code is not exhaustive, but it does touch upon the principal effects. That is not the complete story however. The Secretary of Defense, in his semi-annual report covering the first half of 1953, remarked that the Code's "benefits are not entirely unalloyed." With this caveat, let us see the debit side of the ledger.

Protracted appellate review is the most obvious harmful effect of the Code. Our civilian brethren, accustomed to and troubled by the long delays in the civilian courts, may not be dismayed by the statistics indicative of prolonged proceedings, but to the military the imposition of such delay is equivalent to nullifying the deterrent effect of the sentence involved. Certified cases, that is, cases forwarded by The Judge Advocate General to the Court of Military Appeals for review, require on an average over half a year before the opinion is handed down by the Court of Military Appeals. As for cases going to that court on petition by the accused, if the petition is denied the delay averages about seven months from trial to denial, and if the petition is granted the delay from trial to opinion by the court extends to an average of twelve months. When one considers that the median sentence to confinement is about two years, and that time off for good behavior, clemency, and parole may reduce that confinement by half, it becomes apparent that the delay incident to the cumbersome appellate procedure has created a wholly new set of problems. The Secretary of Defense reported in 1953:

The most pronounced adverse impact upon the military justice system appears in the intricacies and delays attending appellate review. Since convicted persons have a right to appeal they may delay the final disposition of cases although the petition for review may be entirely without merit and even when it follows an original plea of guilty. Moreover, because of delays in the appeal process, convicted persons receiving short sentences of confinement may have served their sentences before the proce-

24. See, e.g., *United States v. Greer*, 13 C.M.R. 132 (C.M.A. 1953); *United States v. Eggers*, 11 C.M.R. 191 (C.M.A. 1953); *United States v. Rosato*, 11 C.M.R. 143 (C.M.A. 1953); *United States v. Wilson and Harvey*, 8 C.M.R. 48 (C.M.A. 1953).

25. See FRANK FEDELE, *THE UNITED STATES COURT OF MILITARY APPEALS AND APPELLATE REVIEW IN MILITARY LAW* (1954); John V. Thornton, *Military Law*, 28 N.Y.U. L.Q. REV. 128 (1953); Seymour W. Wurfel, *Court-Martial Jurisdiction Under the Uniform Code*, 32 N.C. L. REV. 1 (1953-54).

dures prescribed by the Code is completed. These individuals are rendering no benefit to the service during this period, but must be retained on full pay status until appellate review is concluded. This involves great expense to the taxpayer and, because of the frivolous nature of the appeal, is generally of no value to the accused.²⁶

The Code is costly, particularly in terms of personnel. Despite the fact that a large Judge Advocate General's Corps is required to operate the Code, it is still necessary to call upon the officers of the other branches of the service in large numbers. For instance, the duties of the investigating officer, the summary court-martial, members of special and general courts-martial, counsel in special courts-martial, and assistant counsel in general courts-martial are almost always performed by what might here be called the military laity. The Code only negligibly reduces the demands upon the non-lawyers, while at the same time it greatly increases the demands upon the lawyers in the service. Other than a judge advocate, every officer spending time upon military justice duties is taking it from the time he could be spending in his primary assignment.

Insofar as legally trained personnel are concerned, it appears that the Code requires roughly one lawyer for every one thousand servicemen. During a war of the magnitude of World War II, when there were as many as 12,000,000 people in the service at one moment, there would thus be required somewhere in the neighborhood of 12,000 military lawyers. It is no secret that the services do not now have anywhere near that number of military lawyers, regular or reserve, active or inactive. Probably less than one half of that figure would be presently available. The balance would have to come from the civilian bar. Lest anyone labor under the misapprehension that any civilian lawyer can easily and quickly be transformed into a military lawyer, that "difficult law points in courts-martial cases are practically non-existent,"²⁷ let him consider the remarks of a staff judge advocate, fresh from service in Korea, when he said: "Perhaps there is no other assignment . . . that taxes the ingenuity, resourcefulness, competency, and physical and mental stamina more than that of a Staff Judge Advocate of a division engaged in combat."²⁸ Let him also consider that the decisions of

26. DEPARTMENT OF DEFENSE, SEMI-ANNUAL REPORT OF THE SECRETARY OF DEFENSE, 1 JANUARY TO JUNE 30, 1953, 122 (1953).

27. Arthur J. Keefe & Morton Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 150, 162 (1949-50).

28. REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE, 21-25 APRIL 1952, at 50.

the Court of Military Appeals and the Boards of Review are published at the rate of about five volumes annually; the most diligent military lawyer is hard pressed to read and digest such a mass of material. Any lawyer undertaking the duties of a judge advocate now or in the future will have to come to grips with and master a fast-growing body of military case law. Even the judges of the Court of Military Appeals have had difficulty in dealing with what have been mistakenly referred to as the military's uncomplicated legal problems.²⁹ In a sample period of eight weeks the court handed down forty-five opinions, only nineteen of which were unanimous. Approximately one-third of these forty-five opinions contained dissents. If the civilian judges of this Court, after three years of experience on this bench and many years of civilian law experience prior thereto, cannot agree on the state of the military law, think what faces the civilian lawyer called to duty with the services as a military lawyer.

One further shortage has been noted—that of qualified court reporters, particularly in overseas and combat situations. All of the services have struggled with this problem, particularly by undertaking large scale experiments with sound recorder-producers and the Stenomask, but as yet there remains unanswered the question of where reporters in necessary numbers will be found.

All of these shortages existed during World War II, when the requirements for legally-trained personnel and qualified reporters were not nearly so great.³⁰ There is little optimism in the services that the problem of personnel shortages can be any more easily handled in our next great conflagration, should it occur, than in the past.

The next defect of the Code is probably the most serious. Whereas there may be increased confidence on the part of the public in military justice now that it operates under the Uniform Code of Military Justice, the reverse seems to be true for the military commanders. The Ad Hoc Committee on the Future of Military Service as a Career (the so-called Womble Committee) reported in October 1953:

The committee unanimously concludes that professional standards have been permitted to deteriorate through lack of effec-

29. For an example of an extremely difficult phase of military law, and the court's struggle to find a solution, see *United States v. Gibson*, 13 C.M.R. 68 (C.M.A. 1953).

30. REPORT OF THEATER JUDGE ADVOCATE, ETOUSA & USFET, 4 APRIL 1942 TO APRIL 1946 (3 Apr. 1946).

tive disciplinary control. The adoption of the Uniform Code of Military Justice, with its unwieldy legal procedure, has made the effective administration of military discipline within the Armed Forces more difficult.

This is a terrible indictment of the Code, for it indicates a failure of the system to equip the commander with one of the tools necessary to the accomplishment of his, and the service's, primary mission—success in combat. The pendulum has swung, it would seem, from too much emphasis on the “military” aspect of military justice to too much emphasis on the civilian procedural aspects of law.

Several students of military law have made observations with respect to the functions of military law directly bearing on the commander's side of the picture. In 1880, General William T. Sherman wrote in the *Journal of the Military Service Institution of the United States*:

Civilian lawyers are too apt to charge that Army discipline is tyranny. We know better. The discipline of the best armies has been paternal, just and impartial. Every general, and every commanding officer, knows that to obtain from his command the largest measure of force, and the best results he must possess the absolute confidence of his command by his firmness, his impartiality, his sense of justice and devotion to his country, not from fear. Yet in order to execute the orders of his superiors he must insist on the implicit obedience of all in his command. Without this quality no army can fulfill its office, and every good citizen is as much interested in maintaining this quality in the army as any member of it.³¹

General Pershing, in his work, *My Experience in the World War*, stated:

In a new army, like ours, if discipline were lacking, the factor most essential to its efficiency would be missing. The army was composed of men representing every walk of life . . . and practically all were without military experience. In the beginning, our army was without the discipline that comes with training. The vast majority of both officers and men were unaccustomed to the

31. 1 GENERAL WILLIAM T. SHERMAN, J. OF THE MIL. SERVICE INST. OF THE U.S. 132 (1880).

restraints necessarily imposed, and unfamiliar with the rules and regulations required to insure good conduct and attention to duty.³²

Mr. George A. Spiegelberg, in his article, *Reform of Courts-Martial*,³³ remarked that “[t]he authority of command must not be undermined by limiting in any way its power to enforce obedience and respect”³⁴ Former Secretary of War Newton D. Baker stated that the administration of justice is a compromise between speed and certainty, and that it was inevitably difficult in a hastily formed Army

to establish such processes as will throw around every man in the Army, whether private or officer, the surest safeguards and protections which can be devised against either error of law or passion or mistake of justice at the hands of those who try him, involving either his property, his honor, or his life.³⁵

Even the United States Supreme Court has announced the basic principle that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty”³⁶

Clearly today no one will argue against the proposition that any system of military justice must be fair and in accord with the basic principles of American justice. But the techniques whereby that fairness is achieved and those basic principles of justice are applied change with the situation—and with the times. Modern warfare requires a greater degree of teamwork, holds the individual to a higher standard of military proficiency, and subjects that same individual to greater mental and physical stresses than ever before in history. The failure of the individual soldier today could cause the loss of great shares of the nation’s wealth or could result in devastating loss of life. The normal human being seeks survival—but survival in modern warfare is at best a tricky matter. Increasingly there is evidence that the normal man requires support to enable him to enter the fight. Some men find this support only in compulsion generated by fear of the consequences of defection equal to that they face in battle. Long ago Lord Birkenhead stated that “where the risks of doing one’s duty is so great, it

32. 2 GENERAL JOHN PERSHING, *MY EXPERIENCE IN THE WORLD WAR* 97 (1931).

33. George A. Spiegelberg, *Reform of Courts-Martial*, 35 A.B.A. J. 29, 31 (1949).

34. *Id.*

35. 1 FREDERICK PALMER, *NEWTON D. BAKER: AMERICA AT WAR* 279 (1931).

36. *Burns v. Wilson*, 346 U.S. 137 (1953).

is inevitable that discipline should seek to attach equal risks to the failure to do it."³⁷ And former Secretary of War, Robert Patterson noted:

The soldier who commits [a military] offense must pay the penalty, and the penalty must be severe enough to act as a deterrent to others. His fellow soldiers are entitled to the assurance that no soldier can dodge the perils of battle without paying a heavy price. A military prison is safer than the battlefield, but it should not be made into a soft berth, and certainly no soldier who commits a serious offense should be sent back to civilian life ahead of the steady soldier who did his duty.³⁸

There must be, then, in the framework of military justice that form of compulsion that forces a man to something against which his spirit, his training, and his entire being rebels. The military services and the nation cannot tolerate the faltering soldier, the coward, or the traitor whose act may cause the bitter and wasteful death of even one comrade. The Code must provide a means for imposing upon a military offender punishment that will serve as a deterrent to others.³⁹ And that punishment must be swift and sure.⁴⁰ When peace is finally won it will be time enough to reexamine sentences of long confinement and to consider restoring that offender to society.

The civilian lawyer has struggled with this concept of the necessity of the exemplary effect of punishment in cases involving military offenses. And yet there is certainly a case to be stated for that concept. The man undergoing daily hazard of death is not inclined to be very content with the prospect of facing another day of fighting when he knows that a cowardly comrade is resting comfortably in jail in the safety of the rear areas. Nor is this soldier made happier by the thought that as soon as the war ends, this same coward can begin to look forward to an early release from confinement and the enjoyment of many of those things of life for which the sol-

37. Lord Birkenhead, a British politician, served as the British attorney-general from 1915 to 1918, and served in the Cabinet of David Lloyd George as Lord Chancellor from 1919 to 1922.

38. Robert P. Patterson, *Military Justice*, 19 TENN. L. REV. 12, 13 (1945-1947).

39. For an interesting and timely article concerning a wartime execution of a military offender, see Frederick B. Wiener, *Lament for a Skulker*, U.S. ARMY COMBAT FORCES J. (July 1954).

40. The First British Mutiny Act (1689) provided in part that deserters would "be brought to a more exemplary and speedy punishment than the usual forms of law will allow." Universally, military codes have sought this goal of expeditious certainty.

dier carries on his fight. It is not vindictiveness that argues for the severe punishment for military offenders. It is its deterrent power: the penalty must be such that a soldier will at least subconsciously weigh his prospective act of misconduct against the certainty of heavy punishment. It might also be noted that there is in this an inherent spirit of justice to those who stand and fight, who get up and go forward at command even in the face of certain death.

The Womble Report did not contain specific references to areas where the administration of discipline had been made more difficult, but those areas are not very obscure. One of these, the delay in appellate procedure, has already been mentioned. Another directly concerns the small-unit commander, the man most in need of assistance in maintaining discipline. He is the closest to the troops; he is the man who customarily gives them the orders that compel them to risk their lives. Yet the Code gives him the least support. Take for example the workings of non-judicial punishment.⁴¹ In order that he may adequately deal with minor military offenses in a manner that will not leave the blot of a judicial conviction upon a soldier's record, unit commanders are permitted to impose very limited punishments without the necessity of referring the matter to a court-martial.

For example, a captain, commanding an infantry company of about 200 men, may reduce a private first class to the grade of private, or he may restrict any of his men to specified limits for up to two weeks, or he may impose two hours of extra duty per day for up to two weeks. Obviously, these punishments are of little practical effect where the offender is a private in a unit in combat or in the field. Since the Code prevents the use of the lowest court-martial, the summary court,⁴² without the accused's consent, unless he has first been offered and has refused non-judicial punishment, the unit commander is often faced with the dilemma of deciding whether to impose an insignificant punishment or undertake the procedurally burdensome task of bringing the offender before a special court-martial.

A few combat commanders resolved this problem by assigning the dirty-and the dangerous-jobs as punishment for those who should more properly have been dealt with by non-judicial punishment or even by court-martial. The objections to such a practice are obvious. But when the commander is so circumscribed by procedural red-tape, his powers of legal

41. UCMJ art. 15 (1950).

42. *Id.* art. 20.

punishment so emasculated, and the performance of his primary duties so hindered by time-consuming attention to secondary matters, it is only reasonable to expect that he will turn to some short-cut that will serve his purpose of quickly and easily punishing an offender. Clearly, then, the Code has somehow failed the small-unit commander, because it has not equipped him with tools adequate to deal with minor military offenses—those annoying acts of misconduct which so eat into the efficiency and discipline of a military unit.

Finally, let us turn for a moment to the burden of the Court of Military Appeals. In 1949, A. J. Keefe and Morton Moskin wrote that “there should be no difficulty at the present time in [the Court of Military Appeals] reviewing all court-martial convictions.”⁴³ The writers could not seriously have contended that the Court of Military Appeals could review summary and special courts-martial, and their failure to see any difficulty for the court in reviewing general courts-martial is palpable. In about twelve percent of cases acted upon by a Board of Review the accused petitions the Court of Military Appeals for review. The Court of Military Appeals grants on an average only one out of eight of those petitions. About one half of all grants result in affirmance. As of 31 December 1953,⁴⁴ the Court of Military Appeals had received over 4000 petitions from accused since the inception of the Code. The backlog of the court’s work, however, has been such that opinions are as likely as not published a year after the trial of the case. And yet the nation is mobilized on a peacetime basis, with the armed forces strength at about one-fourth of the World War II peak. What will be the result of an all out mobilization?

Certainly it is true that now is the time for the Court of Military Appeals and the Boards of Review to wrestle with the fundamental questions, when time is available for thorough study. Opinions and precedents must be stockpiled like any war commodity, ready to be drawn upon when the situation demands and time is no longer available. In time of war it will probably not be necessary for the court to write opinions in as high a percentage of cases as it presently does. Nevertheless, the cases coming to the

43. Arthur J. Keefe & Morton Moskin, *Codified Military Injustice*, 35 CORNELL L.Q. 150, 162 (1949-1950).

44. UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, 1 JUNE 1952 TO 31 DECEMBER 1952, at 21 (1953).

court must be read, and this requires time and personnel. Adding appellate counsel and commissioners will solve only part of the problem.

The above mentioned criticisms of the Code are not by any means all, but they are the most significant. Clearly, these criticisms are important enough to shake the confidence of those charged with administering military justice under the Code.

The overall picture is not hopeless, however. One fact is certain: in the event of a large scale war, nothing, not even judicial processes, will be allowed to hinder the fight for survival. If the Code does not work, something else will take its place. Accordingly, even the severest and most skeptical critic of military justice must re-examine the Code with an eye to both of its primary functions. Some changes have already been proposed by The Judge Advocate Generals of the various services, and have been studied by the Court of Military Appeals and a special committee appointed by that Court.⁴⁵

These changes neither cut into the basic rights of an accused, nor do they eliminate in any way the safeguard accorded him. They do strive to eliminate waste of personnel in making useless records of trial and undertaking reviews of meritless petitions, to increase the authority of the commander to deal with minor offenses, to permit earlier execution of sentences. Space does not permit a detailed examination of the proposed changes. Some, however, bear scrutiny at this time. For instance, it is proposed that in general courts-martial where the accused pleads guilty, he may be tried before a one-man law officer court, if the accused, his counsel, and the convening authority agree. Another proposal would permit a one-man law officer special court-martial. One recommendation would change Article 15, the non-judicial punishment article, to permit short confinement and small forfeitures of pay for minor offenses by enlisted men, and to permit larger forfeitures of pay of officers and warrant officers. It has been proposed that where there is an acquittal or the trial results in no punitive discharge and confinement less than one year, the record of trial need not be verbatim. Where an accused requests the execution of his punitive discharge and there remains no unexecuted sentence to confine-

45. UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATE GENERALS OF THE ARMED FORCES, 1 JUNE 1952 TO 31 DECEMBER 1953, at 23 (1954).

ment it has been proposed that he may be so discharged, although this would not effect the review procedure.

Have the proposed changes gone far enough? If enacted into law they will be of material help in correcting some of the defects of the Code. But it is not likely that all has been done to attain the supreme objectives of military justice. There are many techniques and procedures that have been considered with a view to lightening the load of military justice upon the services. It has been suggested that *all* justice matters should be in the hands of the lawyers; courts-martial should be appointed only by major commanders; courts should serve on an area basis rather than a unit basis, as at present, and should be permanent; officers of other branches should not serve as court members but rather the court should be composed of three judges who would determine questions of fact and law; sentencing should be taken from the court altogether and should be placed in the hands of the law officer who would be appointed by a higher command than the one convening the court; sentencing should be indeterminate at the trial level, that is, that the conviction of an offense carry with it a fixed maximum and minimum punishment, and that the actual time spent in confinement would be determined by the various clemency and parole agencies.

It is enough for the present that lawyers, both military and civilian, join in studying the problem and bending every effort to discover the remedy. In the event the recently proposed changes of the Court of Military Appeals and The Judge Advocate Generals are enacted into law some substantial improvement will be forthcoming.

In conclusion, however, it must be made crystal-clear that the operation of any system of military justice depends not upon a Code but upon the quality and quantity of the men who are charged with its enforcement. No amount of legislation will replace the intelligent application of fundamental principles of fairness, promptness, and certainty—that must come from the brand of man vested with the power and the responsibility. Both the legal profession and the military services must combine their wits to see that the nation has a sufficient number of such men when the next test of survival arises.

OBSERVATIONS: 2000

MAJOR GENERAL (RETIRED) GEORGE S. PRUGH, JR.⁴⁶

In early 1951, a judge advocate conference was convened at the famous Hotel Berchtesgadenhof in Bavaria, the purpose being to prepare the judge advocates (JA) stationed with elements of the U.S. Army in war-torn Occupied Germany for the application of the new Uniform Code of Military Justice (UCMJ or Code), enacted into law as of 5 May 1950 to become fully effective 31 May 1951. To accompany the new Code was a new *Manual for Courts-Martial*, issued by President Truman as an Executive Order, dated 8 February 1951 and effective the same date as the new Code.

Fifty or more JAs assembled to hear the briefer sent from the Office of The Judge Advocate General (OTJAG) in Washington. The audience was composed of roughly two groups. The first consisted of senior officers with considerable experience as civilian lawyers who were or shortly would become staff judge advocates or law officers. The second group was made up of officers recently admitted to the bar, captains and majors, most of whom were newly integrated into the Regular Army and whose duties were primarily as defense counsel or trial judge advocates (prosecutors).

The conference attendees came from the half a dozen or so military posts that divided the American Zone of Occupation and exercised general court-martial jurisdiction. In addition to these major jurisdictions there were a few combat arms units composing the division-sized constabulary that provided the security of the command. The implementation of the new UCMJ would be the responsibility of these general court-martial jurisdictions.

The Wetzlar Military Post, of which I was one of the representative attendees at the conference, was situated on the northern side of the American Zone, abutting the British Zone to the west, the Soviet Zone to the east, and the French Zone to the south. It was the largest Military Post in area but the smallest in troop strength in the American Zone. Troops assigned to the Wetzlar Military Post included major supply installations,

46. The Judge Advocate General, U.S. Army (1971-1975); Staff Judge Advocate, U.S. Military Assistance Command, Vietnam (1964-1966); Legal Advisor, U.S. European Command (1966-1969), and the Judge Advocate, U.S. Army Europe (1969-1971).

many transportation, engineer, and ordnance elements, an armored cavalry regiment patrolling the eastern border particularly the Fulda Gap, a field artillery battalion stationed in the city of Wetzlar, the U.S. Army Europe replacement depot at the university town of Marburg, and at Giessen a separate infantry battalion (that had as one company commander then Captain Joe Bailey, years later to become a stalwart military judge on the Army Board of Review).

The JA office for the Wetzlar Military Post at that time was typical of the organization, experience level, and professional quality of the general court-martial jurisdictions then in Germany. It consisted of four judge advocate officers, two civilian attorneys to handle procurement law, claims, and military affairs issues, a German interpreter, one or two court reporters, and a couple of clerks. Training and applying the UCMJ would be the responsibility of the JA office.

Lieutenant Colonel Jim Burnett, formerly a prosecuting attorney in Kentucky and a longtime JA in Europe, was the staff judge advocate. Our law member (soon to be called law officer) was Major Don Manes, later to be assigned as Assistant Exec at OTJAG in Washington and to be designated by TJAG General Decker as the action officer for the famous *Girard* case.⁴⁷ If law officer help was required it could be obtained through the headquarters at Heidelberg from Colonel Charlie Berkowitz (a former prosecutor in New Jersey) or Lieutenant Colonel Wally Solf (later to become the chief military judge). Major Bill Kramer (later to be another distinguished member of the U.S. Army judiciary) was the defense counsel, and I, the least experienced in the office with a mere twenty or so general court-martial trials, was the trial judge advocate, soon to become the trial counsel.

Everybody in the Wetzlar Military Post JA office took a crack at legal assistance but our main tasks were in the military justice cases. The consistency of our primary duties facilitated liaison with the civilian and mil-

47. *Wilson v. Girard*, 354 U.S. 524 (1957) (holding that neither the Constitution nor any statute enacted subsequent to the effective date of the Treaty between the United States and a foreign state bars the carrying out of an agreement, authorized by the Treaty, relating to jurisdiction over offenses committed in that foreign state by members of the United States Armed Forces). In *Girard*, an American soldier who, while guarding a machine gun and articles of clothing in an Army exercise area in Japan, fatally wounded a Japanese woman who was gathering expended cartridge cases in the area. The Supreme Court denied a writ of habeas corpus and determined that the soldier should, as requested by Japanese authorities, be delivered for trial on criminal charges in the Japanese courts.

itary law enforcement and investigative offices, including the High Commissioner's court and the Kreis resident officer (the local representatives of the U.S. occupational authority). Although we had a very busy work week of five and a half days, it was customary to be in the office or out investigating or preparing a trial every day. All of us lost leave regularly. Familiarization and training in the UCMJ were new added burdens for the already struggling JA office.

The conference atmosphere at Berchtesgaden in 1951 was skeptical if not hostile to the briefer. After all, it was only recent that the Army had had to undergo the study and application of a revised military justice system with the adoption of the Elston Act and the *1949 Manual*. That new law was an embellishment of the Article of War law that served since World War I. The conferees sought answers to many questions regarding the new Code. Why is it necessary to make sweeping changes in that older law after it successfully served the United States through those great conflicts? What is to be gained by an overwatching civilian Court of Military Appeals? Isn't it risky to undertake such a change in the midst of the then current disasters in Korea? Why should the very useful law member be removed from the trial court's deliberations? Is it not foolish to charge the law officer with the requirement to instruct the court-martial on the elements of an offense, thus adopting a civilian procedure that so frequently generates error on appeal? This new Code obviously demanded many more military lawyers—where would the services find sufficient legal talent to meet the needs?

The briefer sought to reply to some of these changes: the peacetime scrutiny of wartime courts-martial had indeed revealed excesses in some cases; some military offense sentences were excessive when viewed in peacetime; notwithstanding the approach towards civilianization, Congress had retained maintenance of discipline as one of the missions of the military justice system; the law officer's duty to instruct on the elements of the offense could be safely satisfied by reading to the court the *Manual's* applicable subparagraphs entitled *Discussion* and *Proof*. (This advice would soon turn out to be inadequate, too simplistic, and inaccurate.) The impact of the new Code and *Manual* was not as burdensome as we had imagined it to be. That burden was a lot heavier on the Navy than it was for the Army.

Other matters were arising to demand our attention: Germany was finally beginning to get on its feet; the Cold War brought substantial increases in U.S. troops to protect along the border with East Germany;

U.S. military responsibility for the Wetzlar Post area was to be exchanged with the French for Kaiserslautern and much of the remainder of the Rhineland-Pfalz; massive construction programs and procurement contracts were initiated to house and support that troop strength; the greatly increased U.S. presence brought families and with them increased legal issues. The North Atlantic Treaty Organization Status of Forces Agreement was in the negotiation process, and speculation was already beginning to be heard about an agreement that would give Germany some share in the exercise of criminal jurisdiction over U.S. personnel with offenses involving Germans. In light of the changes and difficulties now facing the Army, the new UCMJ presented lesser problems of adjustment.

The Berchtesgaden conference broke up on a positive note. We could and would make the new Code work; like any system of law it can be made to function with justice and fairness if the right qualified people were in its key positions; as in the civilian criminal law system much depended on the professional character of the people making the decisions in the lowest levels, at the troop, unit command, field JAs and counsels, and convening authorities.

In practical matters the Court of Military Appeals judges were in a distant and relatively rarefied position. While the UCMJ deliberately tended to "civilianize" the court-martial system, that presented no difficulty for the senior judge advocates and for the junior officers it presented a welcome professional challenge.

The Code has indeed performed well in its peacetime application upon an all-volunteer force. The Court of Appeals for the Armed Forces (CAAF) and the services Courts of Criminal Appeals and their predecessors have largely earned the confidence of the public and the civilian legal establishment. The Code does in fact provide procedural due process for accused service personnel comparable to or even exceeding that found in our American civilian criminal courts.

Following the adoption of the UCMJ were many law related activities that would prove to be beneficial. Illustrative are the maturing and strength of the military judiciary, the creation of the trial defense service, the sophistication of The Judge Advocate General's School at Charlottesville, the development of the Military Justice Reporter service, the publication of *The Army Lawyer* and the *Military Law Review*, the initiation of the Senior Officers' Legal Orientation course, the acceptance of the concept of the expediting negotiated plea, the recognition of the value of the

military magistrate, the refinement of the Military Rules of Evidence, and the assistance of the many instructional materials to include the *Military Judge's Deskbook*.

Fifty years of activity under the UCMJ have quieted the strident voices of so-called reform that Congress heard in those days following World War II. I have been subject to that Code for every day of those fifty years. For the first half of those fifty years, I was an attentive participant in the Code's operations, and for the second half I was an interested enthusiast. For seven years as a retiree teaching criminal procedure at a major law school, I was able to compare the UCMJ to the criminal codes or practices of our civilian community. As a result, I was proud to find the UCMJ to be at the least upon a par with the most enlightened civilian counterparts.

There remain some blemishes, however. The Code, as interpreted by the CAAF, incorporates extraordinary writs that have the potential of delaying and interfering with the legitimate functions of commanders and others in authority. The Code has likewise been interpreted in such a way as to develop a collision between the CAAF and The Judge Advocate Generals of the services. Most serious, however, is the omission in the Code of the recognition that it must function under wartime and draft conditions. In spite of obvious troubles in the application of the Code in the Korean conflict and most especially in the Vietnam war—which saw incidents of fragging, near mutiny, and a burgeoning drug problem—no serious study has been undertaken to evaluate the Code's functioning in times of military exigency and its ability or inability to support the discipline of a command in wartime or other emergencies.⁴⁸

Thus it is that while the UCMJ has given the services—and the country—a fine, workable, fair, just, and generally effective system of military justice there remains a serious problem area that cries out for consideration. How to incorporate the application of the Code in such a way as simultaneously to be fair and just while supporting the maintenance of military discipline under exigent circumstances presents the riddle for today's military lawyers. This is a challenge worthy of their best efforts.

48. See William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1 (1980).

TWO SENIOR JUDGES LOOK BACK AND LOOK AHEAD:**AN INTERVIEW WITH SENIOR JUDGE ROBINSON O. EVERETT AND SENIOR JUDGE WALTER T. COX, III¹**

INTERVIEWED BY MAJOR WALTER M. HUDSON

I. Introduction

On 21-22 February 2000, two senior judges on the United States Court of Appeals for the Armed Forces (CAAF), Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, were interviewed at their offices at Duke University Law School, where they teach classes in criminal law and national security law. Over the course of several hours, Senior Judge Everett and Senior Judge Cox offered their opinions on and insights into many aspects of the military justice system, spoke of controversies that arose during their tenures on the court, and gave advice and suggestions for the future.

Senior Judge Robinson O. Everett was nominated by President Jimmy Carter to serve on the court, and, after being confirmed by the Senate, assumed his duties in 1980 and served as the Chief Judge until 1990. He served an additional two years on the court before retiring from active judge status in 1992. He received his A.B. (*magna cum laude*) and J.D. (*magna cum laude*) degrees from Harvard University, and an LL.M. from Duke University. He is also the Founder of the Center on Law, Ethics, and National Security at Duke University School of Law, where he now teaches.

Senior Judge Walter T. Cox, III was nominated by President Ronald Reagan to serve on the court and, after confirmation by the Senate, began his term in 1984. He became Chief Judge of the CAAF in October 1995 until he retired from full-time judge status in 1999. He received his B.S. degree from Clemson University, and his J.D. degree from the University of South Carolina, where he graduated first in his class. He also served as

1. On 21-22 February 2000, Major Walter Hudson, who teaches in the Criminal Law Department at The Judge Advocate General's School, interviewed Judge Everett and Judge Cox. Main questions appear in bold, subquestions appear in bold, italics. Major Hudson would like to thank Master Sergeant Monique Wagner and Sergeant Michael Shaner for transcribing the interviews of Senior Judges Everett and Cox.

an Army judge advocate and, before service on CAAF, was resident judge for the Tenth Judicial Circuit in South Carolina.

II. Background, Appointment, and Initial Service on the Court

What in your background do you think helped you best to serve on the U.S. Court of Military Appeals, to be renamed later as the U.S. Court of Appeals for the Armed Forces?

Judge Everett: I would assume my background as an Air Force judge advocate. I had twenty-eight years in the Air Force Reserve, most of it as a judge advocate. Not a great part of it on active duty; the active duty was primarily during the Korean War, but subsequently I was in the Active Reserves with a mobilization assignment in Headquarters, U.S. Air Force. That, undoubtedly, helped a great deal. I had also been teaching in the field of military law. I conducted seminars beginning back in 1957 when I did one over at the University of North Carolina School of Law. Perhaps also having served as a commissioner for two years on the staff of the court from 1953 to 1955 helped a great deal; it gave me an inside perspective on the court. So, all of those things combined. I had been the Chair of the Standing Committee on Armed Forces Law—I think it had a slightly different title then—for a couple of years in the late 1970s. I had interacted with the armed services at a relatively high level as far as military justice was concerned—I think that all of that played a part.

Judge Cox: Well, I guess the obvious answer would be that I had a long tradition with The Judge Advocate General's Corps of the Army, having been in the first class, I believe, to be selected to go to law school on the excess leave program in 1964. I was fortunate to be a Distinguished Military Graduate of the ROTC program at Clemson, which in those days made you eligible for a Regular Army commission, and I took a regular commission originally in the infantry. Then I got branch-transferred to the Chemical Corps for some reason while detailed to The Judge Advocate General's (JAG) Corps on excess leave. From the time I graduated from college until almost nine years later, I was affiliated with the JAG Corps, which certainly gave me an appreciation and understanding of the structure of the military and the structure of the military justice system. I was also there for the transition with the Military Justice Act of 1968.²

I think, as far as background to understand the workings of the court, my experience as a JAG definitely would be the main thing. In fact, I

doubt if I would have ever heard of the court had it not been for that experience.

Could you please explain how you were nominated and appointed to serve on the court?

Judge Cox: It's a wonderful story, how I got selected. I was in a very exciting race in the state legislature for the Supreme Court of South Carolina in the fall of 1983 and the spring of 1984, and I happened to be sitting in the office of Judge Billy Wilkins, who was the first Reagan judicial appointee to the District Court bench. He was also a JAG reservist or National Guardsman. He got a call from Senator Thurmond's home secretary, a gentleman named Warren Abernathy, and the conversation was about the Court of Military Appeals. At the time there was a South Carolinian whom Senator Thurmond was urging the President to appoint to the court. And the gentleman decided not to stand for the appointment, and that was what the conversation was about, and Judge Wilkins turned to me and said, "Hey, Walter, do you want to be on the Court of Military Appeals?", and I laughed, and I said, "Yeah, that would be great."

A couple of days later, I got a telephone call from Senator Thurmond—whom I had known all of my professional life anyway—and he said, "Walter," he said, "I didn't know you were interested in the Court of Military Appeals." He said, "I had already promised that I'd support this other fellow," and he said, "but he's dropped out, and it looks like Senator Tower from Texas, who's Chairman of the Armed Services Committee, has a candidate, and so we're probably not going to be a player in this appointment." I said, "Well, Senator, I'm in the race for the Supreme Court of South Carolina. Thank you very much," and then I got a call a couple of days later from his chief of staff or administrative assistant, Mr. Dennis Shedd, who is now a federal judge in South Carolina. And he said, "Senator Thurmond wonders if he could just submit your name to the President to see what'll happen." He said, "It looks like it wouldn't be any chance you'd be appointed, so how about just sending us a résumé and let him put it in," and I said, "Sure."

2. 82 Stat. 1335 (1968). The Military Justice Act of 1968 made several important changes to the military justice system. Perhaps most significantly, it provided for a military judge to preside at general courts-martial, and, per service Secretary discretion, at special courts-martial.

I sat down and jotted out a résumé, didn't go to any experts for résumé advice or anything; I just sent one in. About a month or so later, I got another call saying Senator Thurmond would like for me to come to Washington. He had set up appointments with Secretary of Defense Caspar Weinberger and with the Chief of Presidential Personnel, Mr. John Herrington. I interviewed with them and interviewed with some political appointee-type people and when the appointment was over with at the White House, the Chief of Presidential Personnel said, "Well, Walter, you look like the kind of fellow the Reagan administration would like to have serve, but we've already promised this judgeship to somebody else." I told him, I said, "You don't owe me any apology about it." I said, "I'm in an interesting race for the Supreme Court of South Carolina, and Senator Thurmond drafted me; I didn't volunteer for this position."

Later, I had my first personal conversation with the President, in the late spring of 1984, and I'll never forget it. I was holding court in Columbia, South Carolina, and my secretary came in and said, "The President of the United States wants to speak to you." And I said, "Well, put him on." It wasn't quite like that, but President Reagan came on the phone, and I remember the conversation very vividly. He said, "Judge Cox," he said, "I've got a piece of paper on my desk. If I sign it, it will appoint you to the Court of Military Appeals as a judge of that Court. Would you honor the people of this country by accepting that nomination?" I said, "By all means, Mr. President," and I couldn't think of anything else to say, and he said, "Your record is very nice and very impressive, and we're delighted to have you as a member of our administration." And that's how the appointment took place.

After that, though, I was on a list of persons that he had appointed, and regularly, maybe once a month, once every two months, we would be invited to the White House for coffee. The President would come in and explain some policy decisions he was about to announce and ask everyone to support him and things like that. He was quite a gregarious and outgoing President. He got involved with his appointees. I had the chance to meet him on several occasions, but I hadn't had a conversation with him personally prior to the appointment.

I was interviewed by Secretary Weinberger. I was also interviewed by Mr. Herrington, the Chief of Presidential Personnel, who was very knowledgeable about military justice, and he interviewed me for over an hour. He asked a lot of penetrating questions about the role of commanders. With his Navy background, he was particularly interested in the role

of a commander of a vessel. Since I had no Navy experience, I just answered with what I thought was the right answer, and I guess it was.

But there was no particular litmus test. None of the political types of questions was ever asked. And of course there was extensive screening by the Federal Bureau of Investigations and the Armed Services Committee.

I learned later that my competition for the job was Judge Frank Nebeker, who's now the Chief Judge of the Court of Appeals for Veterans Affairs, and Judge Eugene Sullivan, who at the time was General Counsel for the Department of the Air Force.³ I think I probably was the dark-horse candidate. I don't know that for a fact. Judge Cook⁴ got quite frustrated with the length of the nomination and appointment process. He stayed on as a senior judge for at least a period of time after, and then finally got frustrated and told the people in charge that he wanted an appointment; he wanted to retire. I don't remember exactly. I never was conscious of exactly how long that took.

Judge Everett: I first met Jimmy Carter, who was President, a couple of years ago when he spoke at Duke graduation. I told him it was about seventeen years too late, but I wanted to thank him for appointing me. He was the only President, to my knowledge, who used a commission system in choosing federal judges, both Article III judges and the judges of our court. And so I appeared before a commission. The commission made recommendations to the President; the President made the choice. Then, of course, the nomination went to the Armed Services Committee.

I was interviewed at the Pentagon. There were various people who were candidates in one form or another. I was a candidate for what amounted to about a fifteen-month term, and I sort of viewed it as a sabbatical that would be in store for my teaching career. It turned out to be much more extensive because of a change in the law that took place in December of 1980. But, originally, I was just there to serve a short term. There was a technical amendment; that was in December. And, basically, what it did was say that, henceforth, anyone appointed would be appointed for a fifteen-year term.

3. Judge Eugene R. Sullivan was later appointed to the Court in 1986.

4. Judge William H. Cook, who served on the Court of Military Appeals from 1974 to 1984, and whom Judge Cox replaced.

Anyone who was then serving would have either ten years or the unexpired term, whichever was longer. So that had the effect of extending my term from the spring of 1981 until the spring of 1990, and then there was a further extension by legislation that decided to make all the terms begin and end on October the first. The idea there being that they were going to expand the court from three to five, and it was going to be important to have everything done at the same time, so I got another five or six-month extension. And instead of serving thirteen months, I wound up serving ten and one-half years as chief judge. Then, because of a delay in filling the vacancy my retirement had created, as well as the two vacancies created by the expansion of the court, I served another year and a half.

What were your expectations of the court before you went on? Did you have any sort of preconceived notions and did working there differ from those notions once you started to sit on the court?

Judge Everett: There had been some administrative problems, internal problems, that I was aware of. There had been, apparently, some friction between the Pentagon and the court. I know that the General Counsel of Department of Defense (DOD), Deanne Siemer, had proposed that the court be abolished and the jurisdiction be transferred to the Fourth Circuit, as I recall.⁵ Given that situation, and given that the two judges then remaining, after Judge Perry⁶ had resigned to become a district judge in South Carolina, had different philosophies, I knew that there would be some problems to be resolved. It was going to be important to try to develop harmonious relations on all sides. I knew also that the caseload was kicking up due to the war on drugs, and some other problems were carried forward from the Vietnam period. I knew there would be some real administrative challenges and that it would be important to get out in the field and learn what was going on. In any event, there were some major problems to be dealt with.

I wanted to go out in the field, and in 1980, a few months after taking office, I went out to the Far East. In October, I went to Japan, Korea, Okinawa, The Philippines, just visiting different commands, talking to judge

5. In 1978, when the conflict between the services and the court reached a climax, Ms. Siemer proposed abolishing the court. See JONATHAN LURIE, PURSUING MILITARY JUSTICE, 257-62 (1998).

6. Judge Matthew J. Perry, who served on the Court of Military Appeals from 1976 to 1979.

advocates. A year after that, I did the same thing in Europe. I had a little bit more of a hands-on feel for it than I would have had otherwise. My philosophy was to try to do as much as possible to build the confidence in the court and an understanding of the court.

That's why I took the initiative some years later in instituting "Project Outreach," which started, as I recall, at the JAG School. We went down to hear an actual case, two cases I think, and this had been suggested by Professor Steve Saltzburg,⁷ then of the University of Virginia Law School. He had also been on a court committee, which I had helped establish, or had established. Steve thought it would be nice if we came down to the JAG School and let the persons in training to be judge advocates see an argument before the court. Because that was such a success, we replicated it many places thereafter at law schools. I mean, technically, this was done at the University of Virginia Law School; then we did it at Wake Forest; we did it at West Point; subsequently a variety of places. After I had left the court and retired, I believe they went out on an aircraft carrier at one point and heard a case. This type of initiative to build the confidence in the court was something that I tried to do as much as possible to develop.

Judge Cox: When I was either a very junior captain or a first lieutenant, I don't remember anymore, one of the judges, I think it was Judge Ferguson,⁸ visited Fort Jackson, where I was stationed. I was involved with a group of young officers hosting him for dinner. We watched the court quite closely in those days. There was a lot of transition; that's when the *Tempia*⁹ decision came down. We had a major case at Fort Jackson where the Court of Military Appeals held that the search was incident to a tainted confession because *Tempia* had been violated. It was a very sensational rape and murder case, and we had to suppress the evidence of the rape that was the critical evidence.

I was also involved in the case, *Parker v. Levy*¹⁰—in the trial of that case as a gopher. I wasn't a lawyer at the time. It was my last year in law

7. Professor Stephen A. Saltzburg, one of the authors of the *Military Rules of Evidence Manual* and a professor with a long-time interest in military justice.

8. Judge Homer Ferguson, who served on the Court of Military Appeals from 1956 to 1976.

9. Referring to *United States v. Tempia*, 37 C.M.R. 249 (C.M.A. 1967), which applied the rights set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966), to military interrogations.

10. *Parker v. Levy*, 417 U.S. 733 (1974). Captain Howard Levy was an Army physician stationed at Fort Jackson, South Carolina during the Vietnam War who was court-

school, and the SJA brought up two attorneys from Fort Gordon, at least one of whom had been a former U.S. prosecutor or state prosecutor, on active duty who were quite good, to prosecute the case. I was assigned to them to run errands, and one of the notable things that I did in that case was I actually served the post-trial review material on Doctor Levy. At the time, he was confined by himself in a large, vacant wing of the old Fort Jackson hospital, and he couldn't have been a nicer, more dignified, intelligent person. *Parker v. Levy* was decided a couple of years later. *O'Callahan*¹¹ was decided during that era. It was an active period for the court, and I was very aware of the workings of the court.

When I got to the court, it was still a three-judge court. I didn't know Judge Fletcher¹² or Judge Everett personally, and I'd been out of military justice for several years. I'd stayed in the Reserves a couple of years, but the last three or four years I hadn't been involved in military justice at all, so I was not aware of their political philosophies or of the controversy surrounding the court in the 1970s until I got there.¹³ I was a conservative, southern Democrat, who grew up in a judicial system where law and order was important—you didn't look for ways to reverse cases. You'd look for ways to affirm them, and I didn't have any preconceived notions about the court at that time that I went. I viewed it as just a good chance to get back involved with the military community. My wife had been very upset that I ever left the military to begin with. She really enjoyed our short-lived career. But I told her that every assignment wasn't Munich.

10. (continued) martialled after he had disobeyed orders to train Special Forces soldiers and publicly denouncing the United States military and its involvement in the Vietnam War. In an important case in which it set forth the argument that the military is a "separate community," the Supreme Court upheld his conviction for violating UCMJ articles 133 (conduct unbecoming an officer and gentleman) and 134 (conduct prejudicial to the good order and discipline of the service).

11. Referring to *O'Callahan v. Parker*, 395 U.S. 258 (1969), in which the Supreme Court required evidence of a "service connection" before any offense could be tried in a military court-martial. The Supreme Court later overruled *O'Callahan* in *Solorio v. United States*, 483 U.S. 435 (1987).

12. Judge Albert B. Fletcher, Jr., who served on the Court of Military Appeals from 1975 to 1985.

13. Referring to the conflicts the Court of Military Appeals had with the Judge Advocate Generals and the services over the court's "activist" approach during the mid to late 1970s. For a discussion of the conflicts, see LURIE, *supra* note 5, at 231-71 (1998).

III. Judicial Philosophy

Do you think someone appointed to the CAAF should have a different judicial philosophy than someone appointed to the Federal Court of Appeals; that is to say, should a person in a military court be more or less of, for example, a strict constructionist? Should a judge come to the CAAF with a sort of philosophy that is more inclined toward one view than another when dealing with military justice?

Judge Cox: Sometimes labels are difficult to deal with. I don't think anyone should come to any court with a preconceived notion of how cases should be decided. Having said that, I don't think we, as judges, receive enough training in the works of our business sometimes, to understand the complex relationship between the role of Congress in prescribing the rules and regulations governing the forces, and the role of the commander in chief of implementing those laws and prescribing the procedures, and the role of the court in trying to interpret those laws and procedures in light of the need for a strong military force.

There's nowhere to go for that kind of training. Whether you're a strict construction fellow or whether you're a judicial liberal—those labels really shouldn't come into play as much as an understanding that the relationship between all the facets of government is very important. There's nothing comparable in the civilian arena that I know of, where you have the power of command and the role of the commander and the structure that has to be considered. And I don't know where you go to get that training.

What about deference?

Judge Cox: If you start with the premise that the Uniform Code of Military Justice is at least in large part a criminal justice system—and some people don't accept that premise—if you are looking at it from classical criminal law perspectives, construing the statutes, construing the rules, construing the rulings of the judges and so on and so forth, I don't think deference is necessarily required.

On the other hand, if you're looking for deference, I guess the best case example would be the *Scheffer*¹⁴ case. There the Supreme Court deferred to the President's wisdom in whether or not polygraphy should come into the courtroom. A majority of our court did not defer to the President on that, but I don't think that was a matter of judicial philosophy so much.

Let me put it this way. There's probably less tendency on the part of the judges of CAAF, at least in my experience, to defer to the military on any kind of substantive rules or any kind of judicial rulings in the courtroom or Rules of Evidence and things of that nature. I think we've looked at our role in the classical criminal law sense, not as giving complete deference to the military.

Judge Everett: I think there is certainly plenty of room for creative interpretation. For example, the Constitution speaks in terms of in Article I, Section 8, Clause 14, to the government and regulation of the land and naval forces. I think, obviously, the Air Force is part of the land and naval forces, in one sense, at least for constitutional purposes. There is a famous case decided right after World War II, the *Lichter*¹⁵ case, where the justice writing the opinion speaks of a "marching Constitution," a "fighting Constitution." I think when you're dealing with the armed forces, you have to supervise the system, a position manifested in several opinions.

14. Referring to *United States v. Scheffer*, 523 U.S. 303 (1998) in which the Supreme Court reversed CAAF's decision and held that Military Rule of Evidence 707, which prohibits the use of polygraph evidence, was a reasonable governmental limitation upon the accused's ability to present a defense.

15. Referring to *Lichter v. United States*, 334 U.S. 742 (1948), in which the War Contracts Renegotiation Act was held to be constitutional. Justice Burton stated in the opinion:

It has been said the Constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority. So also, we have a fighting Constitution. We cannot at this time fail to appreciate the wisdom of the fathers . . . as we fight for the freedom of our children and that hereafter the sword of autocrats may never threaten the world.

Id. at 781-82.

Most recently, in *Clinton v. Goldsmith*,¹⁶ we were reversed; but there's a line of cases going back, I think, to the *Bevilacqua*¹⁷ case where the court has spoken in terms of having a supervisory role. Given that until 1983 there was no direct appeal from the court,¹⁸ I believe, Congress wants military justice and related matters to be kept internalized as much as possible, that is, not in the district and circuit courts. I think it is important to look at the whole spirit of the system and that leads me to the conclusion that the court has been right in taking a fairly broad view of problems that it was authorized to solve.

One other example is *Unger v. Zemniak*¹⁹ where there was a special court-martial of a Navy officer who could not be given a sentence by that court which would be subject to review by our court and, nonetheless, we considered the special writ that she was asking for and dealt with the legality of the order for her to give a urine sample in the presence of a subordinate, I think a petty officer.

You need to look at the whole system, what's available, how it relates to the civilian justice system, as you interpret the statutes. Now, obviously,

16. Referring to *Clinton v. Goldsmith*, 526 U.S. 529 (1999), in which the CAAF asserted its authority under the All Writs Act to issue an injunction to prevent the Air Force from dropping Goldsmith, an Air Force major, who had been convicted at court-martial but not dismissed, from dropping him from its rolls. The Supreme Court held that CAAF lacked jurisdiction under the All Writs Act to issue the injunction, and held that CAAF's action was neither in aid of its jurisdiction, nor necessary or appropriate since alternative means of relief were available.

17. Referring to the seminal case *United States v. Bevilacqua*, 18 C.M.A. 10 (1968), in which petitioners sought a writ of error coram nobis after conviction by special court-martial. Although the court denied the petition, it stated:

[T]his court is not powerless to accord relief to an accused who has been palpably been denied constitutional rights in any court-martial; and . . . an accused who has been deprived of his rights need not go outside the military justice system to find relief in the civilian courts of the federal judiciary.

Bevilacqua, 18 C.M.A. at 12.

18. The Military Justice Act of 1983 provided for direct review by the Supreme Court of decisions by the Court of Military Appeals for the first time. 97 Stat. 1393 (1983).

19. Referring to *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989), in which the court asserted jurisdiction after the petitioner sought an extraordinary writ to order the dismissal of charges prior to trial by special court-martial. While UCMJ, article 67(b), which provides the statutory basis for the court's jurisdiction, did not provide a basis for the court to do so in the case, the court held that Congress intended the court's supervisory authority to be broad.

you can't go hog wild in interpreting statutes, and I've been fairly literalistic on some occasions, but I would tend to say on many issues I would view our role as the chief appellate court for an entire system of justice as being somewhat different from that of the Fifth Circuit, Sixth Circuit, or so on.

IV. Service Members and the Bill of Rights

In an article, Judge Cox once asked the rhetorical question: "Does the Bill of Rights apply to service members?" The reply was: "I guess the best answer is yes."²⁰ Is it safer to say that service members enjoy these rights per statutory recognition, rather than inherently by the Constitution? If they do have these rights inherently, how do we derive that from the Constitution?

Judge Everett: I'd say they have some of the rights due to the Constitution itself. There are a few instances where it's excluded: for example, the Fifth Amendment obviously excludes the right of indictment for infamous crimes, which is a right that you possess if you're going to be tried by a federal district court.²¹ Now, apparently, as part of that, going back to *Ex parte Milligan*²² almost a century and a half ago, the same view has been taken on juries, that there is no right to trial by jury. But I think, otherwise, the service member has the right derived from the Constitution.

So the Fourth Amendment, for example, would apply to service members?

Judge Everett: Sure. What is a reasonable search? Well, the circumstance of the military may play a major role in deciding what is reasonable and what is not. When we got into the drug enforcement area back in the

20. See Honorable Walter T. Cox, III, *The Army, The Courts, and The Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 23 (1987).

21. Referring to the Fifth Amendment clause which states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger. . .*" U.S. CONST. amend. V (emphasis added).

22. Referring to *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the Supreme Court held that the right to a jury trial does not apply to military members.

early 1980s, late 1970s, the court took the position that requiring persons subject to a unit sweep to give urine specimens was a reasonable search and seizure.²³ We didn't say it wasn't a search and seizure; we didn't say service members have no Fourth Amendment rights, instead, we saw the criterion as a reasonable search. And this is a reasonable search when you take into account all the needs of the military.

In certain areas, the UCMJ provides greater protection than the Constitution. The Eighth Amendment gives constitutional protection against cruel and unusual punishment. The Code gives protection against cruel or unusual punishment.²⁴ The language of that would seem to imply you get a little bit more protection under the UCMJ than you do under the language of the Constitution, because the Constitution has to be cruel and unusual. Apparently, under the wording of the Code, cruel or unusual would suffice. I don't know whether that has any practical effect or not, so there may be some instances where the Code gives substantially greater protection than is given by the Constitution.

But you have to consider the rights that are given by the Constitution are in turn phrased, in some instances, in terms like "unusual." What is an "unusual" punishment? What is a "reasonable" search? There's a lot of flex in there.

How do we determine what is and isn't applicable to service members? Where do we look to make that determination?

Judge Everett: For the most part, you start with the proposition that the Constitution, the Bill of Rights will apply and you find a couple of explicit—or implicit exceptions, like grand jury indictment and right to trial, and then on others you say, "Sure this applies, but how is it conditioned by the situation of the military?" What makes up reasonable or unreasonable? That's sort of my approach to it.

23. See, e.g., *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983).

24. Referring to Article 55, UCMJ, which states: "Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter." UCMJ art. 55 (2000).

What about the fact that the Supreme Court hasn't ever spoken on whether the Bill of Rights applies? Do you think they ever will, or do you think there's a need for it to address this issue?

Judge Everett: I think they'll sort of handle it the same way they handled the relationship between the Bill of Rights and Fourteenth Amendment Due Process, where there's been a gradual evolution of Fourteenth Amendment Due Process that does not include grand jury indictment. It includes jury trials, but you don't have to have a unanimous verdict in a state trial as you do in a federal trial. You have some of these rights recognized, but some variations between federal and state. And I think the same thing can be true vis-à-vis the military.

Judge Cox: The reason I said, "I guess the best answer is yes," is because no one's ever said "No." My view has been—and I think I've stated this publicly—that the Bill of Rights applies to the extent that they're not subsumed by the necessity of military duty. What does that mean? That probably means in the final analysis—it's almost un-American to say this—but in the final analysis, probably the Bill of Rights does not literally apply to the military, and I can show you examples that prove that.

A military member does not have unlimited free speech. A military member does not have unfettered right to practice his or her religious tenets. You can have a search without a detached, neutral magistrate appointed by the Executive Branch over the Judicial Branch rendering a decision. So if you say, "Do they apply?" Those are examples of where they don't apply, but it becomes moot like your question suggested in that the Congress has by statute and the President by rule making have just about superimposed every right except in those very limited categories.

The response to that is that Congress can simply pull those rights away if it changes the statutes.

Judge Cox: Exactly. And I guess it was the Davis²⁵ case, in which the Supreme Court came about as close to trying to answer the broad question you pose without answering it, when they used Davis to talk about the limitations on Miranda and Edwards v. Arizona.²⁶ I still think that probably the American answer is that the Bill of Rights applies except where it doesn't apply.

As long as an appellate court—and I think the Supreme Court would continue to follow this for the foreseeable future—can find some niche short of the Bill of Rights to resolve a military case, they’re going to do that. If you look at cases—if you look at the language that Rehnquist has quoted in case after case after case stating that the military is not a democratic society,²⁷ that would suggest to me that a current majority would not elevate the Bill of Rights over military necessity, if confronted with a question such as whether the Fourth Amendment applies to a military member. They would say, “Not in the performance of his duty.” Whether he’s on leave and is home off base and all that, I think sure, it applies. I think the Supreme Court would so find, but I don’t think in the military context.

V. Post-UCMJ Changes

In your opinion, after the UCMJ was passed, what stands out in your mind during the past fifty years as the single most influential act, event, or opinion related to military justice?

25. Referring to *Davis v. United States*, 512 U.S. 452 (1994), in which the Supreme Court held that, after a knowing and voluntary waiver of rights under *Miranda v. Arizona*, law enforcement officials may continue to question a suspect until he clearly asks for an attorney. Because *Davis* originated in a military court, Justice O’Connor, who wrote the majority opinion, also stated in dictum:

We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military, and we need not do so here. The President, exercising his authority to prescribe procedures for military criminal proceedings . . . has decreed that statements obtained in violation of the Self-Incrimination Clause are generally not admissible at trials by court-martial. . . . Because the Court of Military Appeals has held that our cases construing the Fifth Amendment right to counsel apply to military interrogations and control the admissibility of evidence at trials by court-martial . . . and the parties do not contest this point, we proceed on the assumption that our precedents apply to courts-martial just as they apply to state and federal criminal prosecutions.

Id. at 2354 (dictum).

26. Referring to *Edwards v. Arizona*, 451 U.S. 477 (1981), which requires that law enforcement officials immediately cease questioning a suspect who has clearly asserted his right to have counsel during custodial interrogation.

27. The Supreme Court has upheld restrictions on speech, religion and other constitutional rights in the military. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733 (1974); *Greer v. Spock*, 424 U.S. 828 (1976); *Goldman v. Weinberger*, 475 U.S. 503 (1986).

Judge Cox: I would really have to say it was the Military Justice Act of 1968,²⁸ which led to the inevitable modernization of the court-martial and put the military judge in charge. By the way, General John Cooke²⁹ and I disagree a little bit on this. He attributes the rise of the power of the military judge to some decisions of the then Court of Military Appeals in the 1970s.³⁰ I don't diminish the court's role, but I think the increase of judicial involvement was inevitable. That's where I differ with him. I think once you create a judge and give the judge the responsibility to run the court, then you've got to give him the tools to administer the court. And once you give the judges the tools to administer, most judges go as far as they can and you have a gradual takeover, so to speak.

Judge Everett: To me, one of the most important events was the *Solorio*³¹ case in 1987, which clarified that jurisdiction was predicated on military status and removed that particular issue. I suppose that would be the top event. Second would probably be, in 1983, the provision for direct Supreme Court review,³² because that did have an effect of giving the court recognition and respectability that it may have lacked before. Interestingly, the Supreme Court has taken a number of cases from our court involving significant issues.

VI. The Status of CAAF

In Professor Lurie's history of the court from 1951 to 1980,³³ one sees two primary themes: the struggle for respectability that the court was going through, and the conflict that would burst open from time to time between the judges and the military establishment, the JAGs. Did you see a consistent overarching "theme" or trend such as the ones described in Lurie's book during your tenure as a judge and as chief judge on the court?

28. 82 Stat. 1335 (1968).

29. Brigadier General (ret.) John S. Cooke, former Commander, United States Army Legal Service Agency and Chief Judge, Army Court of Criminal Appeals. Brigadier General Cooke was also instrumental in the drafting of the 1984 *Manual for Courts-Martial*.

30. See Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977).

31. *Solorio v. United States*, 483 U.S. 435 (1987).

32. Now promulgated in UCMJ, art. 67a.

33. LURIE, *supra* note 5.

Judge Cox: When I first arrived at the court, there was a tremendous tension between the court and the service courts. The Judge Advocates General have always been extraordinarily gracious and polite, so there's never been any open schism like there was in the earlier days when the battle was really on what Jon Lurie describes between the power of the JAGs and the power of the court. There was a huge battle in the early days. It was still present when I arrived at the court; it was very subtle and under the surface so to speak, but there was a lot of tension between the service courts and our court.

I wrote a separate opinion in a case called *Johnson*,³⁴ in 1986, in which I took on the notion of paternalism and the *Care*³⁵ inquiry. The Navy court particularly had just blasted our court as being overly paternalistic—that we didn't understand the rules of life.³⁶ I took them on and said, "I was sympathetic to that view having been a trial judge, but now stepping back and taking a look at it, 'paternalism' is a realistic view." And I gave some talks to the Navy people and other people that probably weren't too popular in those days. I said, "You need to get off of this high horse and start thinking about what our real role is here."

And I credit Judge Everett. He probably did more to put to rest any conflict between the courts. He didn't do it by CAAF cowering to the JAGs or writing opinions that everybody loved. He reversed a lot of cases along the way. He didn't roll over for anybody, but he did it in a gentle, subtle way without trying to revolutionize the system or anything.

34. Referring to his concurring opinion in *United States v. Johnson*, 21 M.J. 211, 216-17 (C.M.A. 1986) (J.Cox, concur) in which Judge Cox wrote:

The [Navy-Marine Corps] Court of Military Review's decisions . . . evince concern that this court is "elevat[ing] form over substance . . . that the Court is "paternalistic" Initially I, too, was troubled by what seemed to be technical rules However, my initial view has softened, and I now feel that there are sound reasons to adhere to the so-called paternalistic rules.

Id. at 216.

35. Referring to *United States v. Care*, 18 C.M.A. 535 (1969), which set the requirements in the military for guilty plea providence inquiries by the military judge.

36. See, e.g., *United States v. Jerasi*, 20 M.J. 719, 731 (N.M.C.M.R. 1985) ("[W]e do not possess the judicial power to dismantle the relic of paternalism.").

VII. Political Questions and the Military

How does the court construe whether something is a “political question” or not, and therefore nonjusticiable, in the context of the military, in which so much is, by its nature, political, since the military deals with executing the will of the President?

Judge Everett: In *Baker v. Carr*,³⁷ the opinion by Justice Brennan has a couple of passages that have usually been viewed as determining when something is a political question. There are textual aspects of it in how something is written, and then so-called prudential aspects, the certain situations where if courts meddle in, they’re not going to know enough to do anything but harm, so there is some precedent for drawing lines. I think that precedent can be properly utilized by the Court of Appeals for the Armed Forces when the occasion arises.

What about the question of separation of powers?

Judge Everett: As the system separates into powers, this results inevitably in expertise being at certain places and not in others. For example, certain skills, certain knowledge will inevitably be in the Executive Branch because in dealing with issues on a day-to-day basis, the Judicial or even the Congressional Branch may not have the expertise in those particular matters. But I think that you can get enough guidance from reported decisions to at least have a pretty good idea of when political questions have been posed and should be left unanswered by the court. Times change. For

37. Referring to *Baker v. Carr*, 369 U.S. 186 (1962) in which the Supreme Court held that a state statute that effected an apportionment deprived plaintiffs of equal protection under the Fourteenth Amendment. In distinguishing between “withholding federal judicial relief [based]. . . upon a lack of federal jurisdiction or upon . . . nonjusticiability,” Justice Brennan wrote:

The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather the Court’s inquiry necessarily proceeds to the point of deciding whether the duty assigned can be judicially identified and its breach judicially determined, and whether protection for the right can be judicially molded.

Id. at 700.

example, in 1966 it might have been a real question as to whether a war was going on in Vietnam, declared or otherwise. You get up to 1970, and we have a half million troops over there, then it's a lot easier to say that there's a war taking place. Some would not even say that under those circumstances, but certainly as you get more information and circumstances change, you can better delineate what is a political question and what isn't.

There are certain things as to which it is pretty clear. The Constitution intends for the Executive Branch to do its own thing and not to have interference from the Judicial Branch, and I think there's some case law that tends to map that out. So it's not an impossible question.

Judge Cox: I'm not sure I can answer that. I guess I go back to the view that I've held that we're somewhat removed from the political question type of situation. Many of those issues have arisen in the administrative separation context.

Do you want to characterize a case like Dr. Levy's³⁸ as a political question case? Or was it a classic disobedience of orders case? Was *Rockwood*³⁹ a political question case or a classic disobedience of orders case?

I think our court has been fairly consistent, and you can prove me wrong by showing me some cases, but I think it has been fairly consistent at least in this area, deferring to Congress and the commander in chief once the policy is established, and not looking behind that at the political questions involved.

Having said that, if I were a federal district judge, would I look at the political question doctrine to avoid answering a question? Probably. But I think—and this is my personal view—I think many, many judges today would not view many questions as political questions; they would think of another rationale to get to them. But the Court of Appeals for the Armed Forces, I think, because of its structure and subject-matter jurisdiction, even when we allegedly have ventured outside of it, it hasn't been to jump

38. Referring to *Parker v. Levy*, 417 U.S. 733 (1974). See *supra* note 10.

39. Referring to *United States v. Rockwood*, 52 M.J. 98 (1999). Captain Rockwood disobeyed orders by entering a Haitian penitentiary to inspect living conditions of prisoners. He was court-martialed and convicted for a variety of military offenses, among them disobeying orders. Captain Rockwood argued that he was justified under international law in his actions. *Id.* The CAAF upheld his conviction.

in to some political-type question. It's been to deal with an individual circumstance.

VIII. The UCMJ in Combat

General Westmoreland and others have complained that the UCMJ and the accompanying sort of modern military justice apparatus are too cumbersome in a conventional war.⁴⁰ Do you see potential problems with the current system in a conventional war, or do you think it's a feasible system in that setting?

Judge Cox: If you take a look at the Military Justice Advisory Commission of 1983, 1984, the Hemingway Commission, and look at the dissenting comments of Colonel Mitchell⁴¹ and some others as to a couple of the issues in there, you will see this yearning for something else, but I don't know what it is. I don't know what General Westmoreland had in mind that would have solved that situation in Vietnam—with the national unrest at home, rampant drug use . . . I don't know what he had in mind—whether the World War II model, two million courts-martial, no judges, all of that would have been a better model.

I can't answer that because I wasn't there in World War II, and though I wasn't there, I saw the results of what happened in Vietnam. Today, how-

40. See William C. Westmoreland & George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice*, 3 HARV. J.L. & PUB. POL'Y 1 (1980).

41. Referring to the Military Justice Act of 1983 Advisory Commission. Colonel Thomas L. Hemingway, USAF was the Chairman of the Commission. As part of the Commission's report, Colonel Charles H. Mitchell, USMC and Captain E.M. Byrne, USN submitted a minority report in which they stated:

There are also pragmatic reasons for caution in civilianizing military law. Not the least of sorrows of military commanders is the amazing facility and speed with which military organizations, given the least opportunity, will grow roots. The most inclined of all to grow them are the administrative and support services. The ever-complicating and burdensome civilian legal machinery has such a facility for bureaucracy and immobilization (amply demonstrated in its own civilian environment) that it is not capable of being implemented in all its glory as far forward in the battle area as the need for legal services does and will exist.

ADVISORY COMMISSION REPORT, MILITARY JUSTICE ACT OF 1983 at 56 (1984) (minority report of Col. Charles H. Mitchell, USMC and Captain E.M. Byrne, USN).

ever, in 2000, the modern courtroom is so easy to take to war. The equipment is available. Scholars should give some thought to ways that we could still ensure soldiers in the field in a major conflict receive due process—to be sure that they are the ones who committed the offense, but minimize the “gray mail” that comes from demanding experts, etc.

I think some compromises could be made in the war zone that would make it work. I can’t articulate a particular one, but from talking to my military judge friends, who held court in Saudi Arabia, who go to Bosnia and hold court, they seem to get along fairly well in kind of makeshift circumstances, but I can see some things that might make it simpler. You might have judge alone sentencing; you might have a lot of things. Maybe expanding the jurisdiction of a special court-martial to one year was a step in the right direction for the wartime situation. But no matter what type of court system—if you go back and read the lamentations of the generals in the Civil War, military justice has always been criticized; it’s always been in the way.

In answer to General Westmoreland, whom I have the highest regard for and know, I think the system would work and work better today than it did in Vietnam because the system’s more mature. The judiciary today—thanks to the JAG School, and thanks to the emphasis that the services have put on—is probably the finest trained judiciary in the world, including the state and federal judiciary.

IX. Continued Problems at CAAF?

At the end of Professor Lurie’s book on the court, he writes:

Traditionally and unnecessarily clothed with the reputation for the arcane, contemporary appellate military justice still suffers from a lack of critical civilian scrutiny, constructive interplay with civilian jurisprudence, an effective and functioning bar, and finally, from a jurisprudence that in the post-Fletcher era increasingly has tended to favor the prosecution.⁴²

What are your responses to this statement?

42. LURIE, *supra* note 5, at 276.

Judge Everett: We're getting more and more civilian scrutiny. I think groups like the National Institute of Military Justice,⁴³ which people like Gene Fidell, Kevin Barry, Steve Saltzburg⁴⁴ have been involved in have done an excellent job in that regard. I think that programs like the seminars that we're involved in at Duke and elsewhere have helped. For example, Judge Cox and I this past fall had the seminar for law students here at Duke on the fifty years under the UCMJ, and I think that's the sort of thing that encourages outside study by civilian commentators. I think also that the circumstance that some of our cases involving issues not unique to the military, such as the *Scheffer*⁴⁵ case, have reached the Supreme Court has led to a recognition in various quarters that the cases we have are parallel to many that arise elsewhere and that they are worthy of comparison.

I think there's been an increased accessibility to the military cases probably as a result of Lexis and changes in key numbers and that sort of thing. So I think there is increased civilian commentary and criticism from various directions. I'm very proud that our "Project Outreach" has been a part of that.

I think we're developing a constructive interplay with civilian jurisprudence, and one other thing we've done is have law students argue cases as amici in our court. Interestingly, we did that some with Georgetown, and Sam Dash⁴⁶ was one of those who presented the argument for the student clinic. The students wrote the brief; he presented the argument. More recently, we've had the students prepare the brief with or without some type of faculty consultation, and then the students would argue it. We've

43. As defined at its website,

The National Institute of Military Justice [NIMJ] is a non-profit organization actively engaged in the promotion of a fair, equitable, and effective U.S. military justice system. Since its incorporation in 1991, NIMJ has undertaken a variety of initiatives in keeping with its overall goals of advancing the administration of military justice within the Armed Services of the United States and fostering improved public understanding of the military justice system.

The National Institute of Military Justice (visited Apr. 5, 2000) <<http://www.freeeyel-low.com/members5/upplj/nimj.html>>.

44. Eugene R. Fidell is the president of the NIMJ, Kevin J. Barry is the Secretary-Treasurer, and Stephen A. Saltzburg serves as General Counsel.

45. Referring to *United States v. Scheffer*, 523 U.S. 303 (1998). See *supra* note 14.

46. Attorney, perhaps best known as the former independent ethics advisor to Kenneth Starr.

attempted to bring these issues more in contact with persons in the law school community, which I think is good.

As far as an effective and functioning bar, when I see the argument in our court and then I sit in on other courts, I think the level is good, for the most part. You get variations, but I think there's more of a systematic effort to maintain quality of advocacy in connection with our court.

Judge Cox: In regards to a lack of critical civilian scrutiny, and constructive interplay with civilian jurisprudence, I think I probably understand where Dr. Lurie was coming from with that. I think what he's talking about is that there's not a ground swell of law school professors or others that look at the system, that write about it or criticize it. There is just a very narrow handful of civilians and military practitioners from the various justice schools, but there's not anybody that takes us to task. "Us" being the military justice system. And Congress—and I agree with him on this—has shown, except for a couple of Congressmen here and there, a real lack of interest in military justice, except when they read an article in the Dayton, Ohio, paper about somebody getting a million dollars from the stock market while he's in Fort Leavenworth.

I don't know whether ever in the history of military justice there's been "critical" civilian review or oversight. I think lawyers and others have had knee-jerk reactions to certain situations. They see them, and they comment on them, and they write about them, and then move on, but there's nothing like the judicial council that looks at all the federal courts and how they operate; there's nothing like the state legislatures that are interested in the judicial systems of their states and all that. I don't think it's necessarily good or bad. I think our system is a pretty healthy system and would stand review from almost anyone.

Concerning a functioning bar, there's really no focus group. so to speak, whose interests lie in military justice. In the military itself, military lawyers are assigned and reassigned by the personnel specialists. There's no cohesiveness there. So there's no group, like in the South Carolina Bar, who's always interested in the system. There's nobody there under the system who always has the interest of the system in mind. There's nobody you can turn to. We've talked about this at the court. There's no one you can turn to and say, "Could you champion this cause or that cause," something a judge couldn't do, something the military would be uncomfortable to do, but that a bar association might well do, that kind of thing.

There's been some efforts over the years to form a bar. The Judge Advocates Association has made overtures to our court to become a bar association of the court, but Professor Lurie's probably right on that. I would probably agree with him that an organized bar of people interested in military justice might be a good thing. It also would probably be opposed by the Judge Advocates General, as an effort to oversee the ethics of our practitioners.

All those types of things would be keenly resisted. That was one of the problems that Judge Fletcher had. He tried to promote a judicial council, which would really be the supervisory authority over the judges and lawyers and everyone practicing military justice.⁴⁷ I don't think Judge Fletcher ever looked at it as a power grab or anything. He looked at it more as what he had back home in Kansas; this is the way bar associations are organized; this is the way courts are organized.

X. The Court's Supervisory Authority

Another area right now that's getting some interest is the court's supervisory authority, especially supervisory writ authority, in light of the *Clinton v. Goldsmith*⁴⁸ case. How far do you think CAAF's supervisory authority extends within the system?

Judge Cox: I can find no statutory authority to tie jurisdiction of our court to a particular case because of our "supervisory" authority. The closest case we've gotten to exercising such authority since I've been on the

47. In 1975, Chief Judge Fletcher made many proposals to the service judge advocate generals. Among them, he proposed that "[a] judicial council should be created to undertake 'a continuous study of the organization, practice, procedure, rules and methods of administration and operation of the military justice system.'" LURIE, *supra* note 5, at 236-37. As Lurie states:

What unified most of these proposals was a marked emphasis on expansion of the power both of [the United States Court of Military Appeals], but—to an even greater extent—the military judge. . . . Even as they increased judicial responsibility, it would be at the expense of the convening authority's jurisdiction. Thus, military hostility to such changes is understandable.

Id. at 237.

48. Referring to *Clinton v. Goldsmith*, 526 U.S. 529 (1999). See *infra* note 16.

court probably was *Navy-Marine Corps Court of Military Review v. Carlucci*⁴⁹ because that really had no nexus to an existing court-martial. It had only a slim, arguable nexus to our Article 67 jurisdiction. It was a simple idea that in order to ensure judicial independence, judges should be judged by judges in the first instance unless there's evidence of criminal misconduct.

That case probably was a real stretch and given *Goldsmith*, had the Supreme Court gotten a hold of that case, I don't know whether they would have just denied certiorari out of sympathy for the facts or whether they would have reached and said, "You have no business in there." I don't know. The Department of Defense Inspector General wanted to appeal it and the Solicitor General didn't, and I think the reason was bad facts sometimes make bad laws, so the powers that be would just rather leave that type of case alone.

That was a supervisory jurisdiction case. I think in *Goldsmith*, the reason the services were concerned was because there has been, at least since I've been on the court, this idea that the Court of Appeals for the Armed Forces wants to expand its jurisdiction; and the TJAGs have been extremely sensitive to any efforts to expand jurisdiction.

I had a meeting once with the TJAGs in which we were talking about this idea: should the court have authority to hear administrative discharges, for example? There was a commission by Congress to look at that, and my idea was that The Judge Advocates General should look at this congressional commission as a blank check to redefine and redesign, if necessary, the delivery of legal services, the use of legal manpower. In reality, we have a commander that's making a decision as to what to do with disciplinary problems. He can decide to prosecute by court-martial or use the administrative discharge route. It goes to a judge advocate either way; it goes to a convening authority either way; and then it just goes off

49. Referring to *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (1988), in which the Navy-Marine Corps Court of Military Review sought an extraordinary writ to prevent the Department of Defense Inspector General from interrogating members of the Navy-Marine Corps Court about alleged impropriety. The Court of Military Appeals granted the writ, and Judge Cox was appointed as a Special Master to investigate the impropriety instead. Writing for the Court, Judge Evertt stated, "We are convinced that it is within our inherent authority as the highest court within the military justice system and within our supervisory authority under the All Writs Act . . . to create an internal procedure for investigating complaints of judicial misconduct within the system." *Carlucci*, 26 M.J. at 339.

into different directions. You could restructure the whole system to take advantage of that opportunity, but the TJAGs were very reluctant to even want to talk about it.

The TJAGs didn't want CAAF to get in the administrative business. So I think *Goldsmith* was legitimately appealed by the government because the TJAGs saw us reaching out into the administrative law realm. Congress had said, "You can drop people like Goldsmith from the rolls." We said, "You can't drop Goldsmith from the rolls," and they just viewed our jurisdiction as a stretch.

I don't think that was supervisory though. I think in this case that it was really a probable and rational result of his court-martial. It just wasn't argued well; it wasn't articulated well before the Supreme Court. I do not know if I could do better, however.

The only case that I can recall since I've been on the court that we got involved with where Article 67 wouldn't have come clearly into play was *Unger v. Zemniak*,⁵⁰ because the case was referred to a special court without power to dismiss Lieutenant Unger or without power to give her a year in prison, so there was no possibility if she lost that she could appeal her conviction to our court. Judge Everett wrote the lead opinion in the case, and if you go back and look at it, found that there was derivative—not supervisory—on the theory that the TJAG could refer it under Article 69.⁵¹

Article 67 says CAAF may take any case reviewed by the Court of Military Review. Therefore, it doesn't limit it to the automatic appeals. I think I agree with Judge Everett: a strict construction of Article 67 would give us jurisdiction over any case that goes to the Court of Military Review, either on appeal or by recommendation of The Judge Advocate General or referral. Having said that, I'm not so sure how I would have

50. *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989); *see supra* note 19.

51. UCMJ article 69(d) states:

A Court of Criminal Appeals may review, under section 866 of this title (article 66)—(1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the Judge Advocate General.

UCMJ article 67(a)(2) (1998) further states: "The Court of Appeals for the Armed Forces shall review the record in (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review"

come down on the cases that purely involved an Article 15 or a summary court-martial.

But courts traditionally have had inherent powers, under the All Writs Act⁵² now, and, prior to that under the common law, to deal with some situations which arise under other articles of the Code. That is the question opened by *Goldsmith*: What are the limits now on that power? What if we have a soldier who's being held in a stockade somewhere, and no charges are preferred and are contemplated. You've got evidence, testimony, from the commanding officer, and he says, "I don't care if he ever gets tried. I'm not letting him out." If the soldier asks for a writ of habeas corpus. What's our jurisdiction?

We don't have any clear jurisdiction, but I think under circumstances like that, the courts—not only our court but courts everywhere—have had inherent jurisdiction to deal with obvious violations of the rights of the people under its jurisdiction. But I don't think that's supervisory. I think it's something else, and I don't know what it is, but I don't think it's supervisory. I think supervisory is saying that we're not going to entertain any cases where a defense counsel hasn't gone through The Judge Advocate General's School and been certified by the TJAG.

I think the use of the term "supervisory jurisdiction" in *Goldsmith* was a poor choice of words in hindsight. At the time I didn't think much one way or the other, but probably in *Goldsmith*, if we really wanted to try to make a better case with jurisdiction, we should have treated it as a petition for reconsideration or something like that, and then said this is a direct nexus to the sentence of his court-martial under Article 67.

But we've had a lot of interesting talks around the court about it. Some scholars and others think *Goldsmith* was probably an aberration because the services were so concerned about us reaching into the administrative business of the secretaries of the departments. Others think it was a good left hook to the chin on the court as far as limitations of jurisdiction. We'll just have to wait until the next case and see what the court does.

Judge Everett: Well, it's hard to tell. I think Congress should really look at that issue because there may be a gap there and a lot of service members may not have their rights properly vindicated until some of the uncertainty is resolved. I guess the remedy that is available to Major Gold-

52. 28 U.S.C. § 1651(a) (2000).

smith under the court's decision is to go through the correction board, and I'm not even sure if they can do that. And then, at some point, get into court somewhere, and I'm not sure exactly where.

The Supreme Court seems to allow some jurisdiction under the All Writs Act, and that applies, as I recall, to any federal court. But, there again, it's supposed to be related to protection of the jurisdiction. And how far exactly you can get with what we have is very unclear to me. They may not be able to get very far at all. The intermediate courts, the courts of criminal appeals, were also beginning to exercise all writs authority, as I recall. And it's rather interesting you have states like California, which use extraordinary writs very extensively as an adjunct to appellate review. And then you have most states that are much more restrictive. And the federal courts are much more restrictive. There are very few opportunities for interlocutory appeal in the federal court system. Should the military be identical in that regard?

I think there's some advantages in having a broader view of supervisory jurisdiction. And I think also the very fact that the CAAF is a civilian court, which, according to its original purpose, was designed to provide for civilian review, creates a little bit of a different situation than that in the federal circuits where there is not the same need for sort of an extraneous body performing the review.

XI. The Court and "Article III" Status

Do you think the court has reached parity with so-called Article III courts⁵³ now? If not, what's left to be done? And what do you think of the related concept of life tenure for CAAF judges?

Judge Everett: I think giving CAAF Article III status is desirable because I think if the court is an Article III court, it can do some things that it needs to do. One of the chief concerns about the court having review of administrative actions, is that it's not an Article III court. The Court of Appeals for the Federal Circuit is an Article III court and, therefore,

53. Article III courts are established under Article III of the Constitution and include the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." These include U.S. District Courts and Courts of Appeal. Article III judges have life tenure. The CAAF is an "Article I" court, established pursuant to Article I of the Constitution. Judges in such courts do not receive life tenure. U.S. CONST. arts. I, III.

reviews administrative actions, even though, I think, our court has a lot more expertise in matters relating to the military. I think for that matter the Court of Appeals for the Federal Circuit will not question that assertion at all. They have plenty of cases to handle. So, to me, the giving of Article III status to the court would make sense.

The caseload is not so heavy that taking on additional responsibilities would be too much of a task. And that would also be the opportunity for judges, if it were an Article III court, to occasionally sit with other Article III courts at the various circuits, and thereby get a little bit better feel for what's happening.

I think Ed Re, who used to be the Chief Judge of the Court of International Trade, a fine legal scholar, sat at one time or another at almost every federal circuit. He was sort of like getting an opportunity to go to these other circuits, and he learned about them, and they, undoubtedly, learned about his particular court.

I think there's some advantages from an Article III status, but, there are a lot of possible disadvantages. I think some of the people who have served on the court are perfectly happy to serve fifteen years and then retire. I'll be honest; I would not have wanted to stay for life. I have plenty of other things I want to do. One thing, as I mentioned to you, I guess I was about fifty at the time. I had no intention or desire to be in Washington the rest of my life. So I think there may be some feeling on the part of those who have served that it's long enough, and they wish to have the retirement. Then they can do some other things.

When I was on the court staff back in the 1953-1955 period, I think, at that point, probably some of those judges were hoping to get Article III status, and I believe either the House or the Senate, I think it was the Senate, initially planned to have a life tenure, which is the key to Article III status.

Congress initially thought, "Well, let's see how it works out before we lock in these judges for life." So, it comes up from time to time. If I were a legislator, I would favor it. In fact, I think someday I will try to talk to some of the staff counsel at the Senate or the House and urge them to at least look into the matter, because I think it would be desirable. I don't think it could do harm, but I don't know whether the other judges sitting on the court now have any interest in it.

Judge Cox: The argument can certainly be advanced that service members being citizens of the United States should be entitled to the same judicial status as any other citizen and, therefore, an argument can be made that the civilian court that oversees the system should have life tenure, no diminution of salary, those kinds of things. Congress could abolish our Court tomorrow, and that would be it. There's no constitutional protection there—so that argument can be made. As long as that difference exists, there will never be parity.

The argument could also be made, that military judges should likewise have life tenure and no diminution and so should the Courts of Criminal Appeals. But our American way of doing it has never given that kind of system to the states. State judges' terms are not long, and they are all subject to reappointment, reelection, or something.

So I've never been—even though I supported Judge Everett's efforts to become an Article III court—paranoid about not being an Article III court. I've never felt as an inferior creature. I mean the argument's there. But as far as the reality, I don't know. I don't know what difference it makes.

All that Congress would have to do is say the judges are reconstituted under Article III of the Constitution and then shall serve during their good behavior. A stroke of a pen and there you are, but what would that change? It wouldn't change our jurisdiction. It wouldn't give us any new powers. Even a federal judge can't hear certain cases that they have no jurisdiction over. I don't think the mere fact of becoming an Article III would expand the jurisdiction of the court.

I think if Congress wants to expand the jurisdiction of the court, it has to not only use the magic language, but it would also have to take a look at the jurisdiction and redefine what that would be.

Regarding life tenure, for judges: in recent years, the question of life tenure has come under attack from scholars and others, for example from Dan Meador down at the University of Virginia.⁵⁴ I think if our forefathers were rewriting the Constitution today, given the longevity of people and all

54. For a recent attack on the notion of excessive judicial independence, to include life tenure, see Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397 (1999).

that, there would be something different than that. It would be like appointment for a term of years.

The theory of life tenure and no diminution in pay is that a judge, given that, cannot be compromised by needing to have that office for financial security and so forth. And most judges give up their law practice and all and go in it. But the counter-argument to that is, “Well, gosh. They don’t have life tenure in the states, and yet people are wanting to be judges all the time.” And so our system survives without it.

But assuming *arguendo* that life tenure is a valid goal, that is to say, let’s have life tenure and no diminution of pay so that judges will have financial security and, therefore, be independent. If you take a look at the system Congress has created for our court, we have a fifteen-year term, and then we go into a senior status. Although there’s some diminution of pay, there’s still financial security. You don’t have this compelling need to be reappointed. If you don’t have a compelling need to be reappointed, you don’t have to compromise yourself. So you have a similar check and balance in the current system.

I’m not opposed to life tenure; I just don’t think it’s absolutely necessary for the independence of our court. While I was Chief Judge, I never championed it. According to Jon Lurie, I may be the only Chief Judge that never did. And I wasn’t opposed to it; I just thought it was an idea that Congress was not willing to swallow. I don’t think they would create any new courts today with life tenure.

XII. Specified Issue Power

A power of CAAF that is criticized (and cited as an obstruction to gaining Article III status) is the specified issue power.⁵⁵ Eugene Fidell co-authored an article in which three basic criticisms were cited.⁵⁶ First, it diverts a limited number of appellate counsel resources that are already spread

55. “Specified issue” power refers to the ability of CAAF to grant review of an issue that has not been mentioned by counsel in their supplements to petitions for review. Although not explicitly set forth in the UCMJ, CAAF has “traditionally reviewed meritorious issues which were not assigned by an appellant or his counsel.” *United States v. Ortiz*, 24 M.J.323, 325 (C.M.A. 1987).

56. Eugene R. Fidell & Linda Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 MIL. L. REV. 117 (1987).

thin. Second, it's at odds with appellate judicial administration in the United States and is a holdover from a time when the system was less reliant on lawyers and was especially concerned about issues like command influence. Third, it impedes Congress giving full-blown Article III status to the court. How do you respond to these criticisms?

Judge Cox: Well, I think Mr. Fidell's criticisms, which I've read and discussed with him, are heartfelt and intellectually stimulating. But I tried to figure out one time how many petitions I've heard in fifteen years, and it was at first perhaps two or three thousand a year, down to—we're predicting maybe eight or nine hundred this year. But assuming fifteen hundred a year times fifteen years: what's that? 22,500. I would query how many issues we specified in that time. There weren't many, I don't think, to begin with, so it doesn't spread those precious appellate resources any thinner I would say.

Secondly, if you analyze the specified issues, some of them, and maybe many of them, I can't remember exactly, are re-characterizations of the way the issue was brought to us. In other words, we specify it, but it really is a restatement in the language we want to decide the case of the issue as presented to us. A good example of that is the *Campbell* case.⁵⁷ On a rehearing, we specified new issues because of the way the case was argued and the way it was presented wasn't what we were concerned about once we got into it. That is a typical specified issue.

Now that to me doesn't seem to encroach on your Article III status or anything else. That's a better way of doing business. If somebody says, "The issue is: The military judge abused his discretion by letting in the fruits of an unlawful search and seizure or something." The real question is: was the search and seizure unlawful? So if we restructure it like that, it's a restructuring of the way the appellate defense counsel presented it, so we get the cleaner argument on it.

This leaves a small category of cases where we have reached out and specified some issue that was not raised, not considered, not anything. I would agree with Judge Everett's argument that that's a portion of the responsibility that Congress has given to our court to have a civilian court

57. Referring to the case *United States v. Campbell*, 50 M.J. 154 (1999), in which the CAAF specified a series of issues concerning what was required for a permissive inference of wrongful use of LSD.

of last resort that shouldn't be trumped by control from the military by the way the military wants to structure the issues. And you and I know that the appellate defense counsel are men and women of good will and want to do the best they can, but the parents back in Clemson, South Carolina, still have an innate distrust for the fact that their son or daughter's lawyer is in uniform.

In the long run, the specified issue power inures to the stature of the court as being able to render the final word in a case, not controlled by the military. The way the court was originally proposed, The Judge Advocates General wanted to control the gate to the court. So that battle was fought in the 1950s.

Judge Everett: I just don't see the criticisms, really. The U.S. Supreme Court has about 5000 petitions for certorari each year that are *in forma pauperis*, and about 2000 or so regular petitions. The Supreme Court, in the interests of justice, will take something sent in from a prisoner *in forma pauperis*, written in a very informal fashion, a letter or something of that sort. If it finds the issue worthy—the issue is raised which the court thinks is worth considering because of the significance of that issue—then it will appoint counsel and, basically, set the case and proceed with some type of presentation of the issues by counsel who are appointed to assist the petitioner. So in the Supreme Court and in many other appellate courts, an effort is made to deal with issues that are implicit in the case, but which are not specifically raised by counsel.

Secondly, it is very unfortunate, but a lot of service members don't trust their counsel because they are wearing a uniform. And they feel like the counsel is beholden to the convening authority, beholden to the government. That's a very erroneous impression, but it exists. And, for that reason, you will have situations where people will pay substantial amounts to civilian attorneys when they might be able to get the same service, or even better service, free of charge from a uniformed lawyer through appointed defense counsel.

So, I think it is good to be able to reassure a convicted service member whose case is being reviewed that he not only will have a counsel who is his counsel, but that also he will have an appellate court that is interested in having justice done and has its own central legal staff who can pick out the good cases that need consideration.

I have tried to read, in some form or fashion, the petitions in all our cases when I was at the court. It was a pretty difficult task, and some of the stuff is just garbage, in the sense that there's no real issue. You could look at it and know it's not there. But there are some cases where counsel's overlooked something where an issue is buried in language that, perhaps, has not been adequately communicating that issue. The chances of doing justice are better if the court says, "Well, they may not have raised this. We're going to specify this issue."

Finally, in specifying issues, you can sometimes tell counsel exactly what you're concerned with and focus them on that particular matter that you wish to decide. So I think we're getting in the right practice and should continue, as far as I'm concerned.

XIII. Standards of Review

It does seem at the same time the court has preserved its specified issue power, it has "powered down" to the lower courts the ability to review issues by giving the lower courts standards of review for all types of legal questions that arise in cases and thus perhaps has implicitly narrowed its own ability to judge or to reverse cases.⁵⁸ Do you see that as a kind of contradiction or tension with its continued specified issue power?

Judge Everett: Not a contradiction. I see them as moving somewhat in a different direction. And, candidly, the effort to specify standards of review, which is very desirable, I think, started with somebody who came in after I left the court. Primarily, I believe, through Judge Wiss. I think he may have been the one who suggested trying to be clearer in that regard. And, certainly, by delineating the standards of review and giving guidance to the lower court, you reduce the number of issues that are potentially available for review. By that, I mean, you shouldn't have as many instances where there's occasion to specify an issue, because that's already going to be taken care of. The lower courts know what they're supposed to do, and they do it.

58. For an overview of CAAF's recent focus on standards of review, see Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213 (1997).

But I still think there are enough cases where injustice might be done if we follow the idea of not specifying issues that I think we should continue the practice. Frankly, the caseload is not that heavy. Back in the early 1980s, there was about a one-year period, or a year and a half where there were two of us there⁵⁹ and we were waiting for a third to come aboard, a long, unhappy period. But the caseload went from about 1700, I think when I went on the court, to about 3200 or 3300 during that period of time. There were a lot of cases. And, even then, we followed the practice of specifying issues.

Judge Cox: No. I don't see a tension. I think when Judge Wiss and Judge Gierke⁶⁰ joined the court, both led the charge for more standards of review. The standards of review probably always were there and not so open and notorious, but the devolution of power, I think, is a different issue. I think that's because our court, at least since I've been there, has wanted to insist upon the Courts of Criminal Appeals and the courts-martial being "courts," and the military judges, "judges" in every sense of the word of American jurisprudence. And to do that, one must give the judges the authority and responsibility to be judges, and give them the tools to do it with.

I don't think that's yielding our ability to review what they've done so much as it's been an effort to make our system a good judicial system. So someone looking at the system says, "That's a good system; it works. Those guys know what they're doing. They've got standards of review; they've got good counsel; they brief their cases well; they argue them well. It's a good system." I think that's what that's all about, more than giving up any power.

XIV. The Service Courts (Courts of Criminal Appeals)

Chief Judge Fletcher once suggested that the service courts consolidate; that there should be one service court rather than four.⁶¹ Given an increased emphasis on "jointness," is this an idea whose time has come?

59. Then Judge Cox and then Chief Judge Everett.

60. Judge Robert E. Wiss served on the court from 1992 until his death in 1995. Judge H.F. "Sparky" Gierke has been on the court since 1991.

61. See Lurie, *supra* note 5, at 238-39.

Judge Cox: I've never really given much thought to that idea. I wouldn't advance that it's an idea whose time has come. As long as we have separate services with separate missions and separate traditions and separate needs for what makes good order, morale, and discipline in those various branches of the armed forces, I think we have a need for lawyers and for judges who understand those various factors. Having said that, ten, fifteen years from now, as to the way we deliver our military might and how we carry out our military missions, as those keep changing, then I wouldn't say, "No," I wouldn't say, "Never." But I don't think it's an idea whose time has come.

I can see the differences between the courts; the way they act and the way they talk and the way they think about the problems that they're having. I can see differences in the way the charges come out and things like that, and I think a unified court would just ultimately create a unified way of doing it. Maybe that's what the Uniform Code of Military Justice is all about, but I just don't think it's an idea whose time has quite come. But I wouldn't say it will never come.

Judge Everett: I thought Judge Fletcher's idea had a lot of good aspects to it, and it may still have a lot of good aspects. I just plain don't know how desirable that would be. There are some advantages in the present system.

Your question about the lower courts reminds me of something that shows how conditions can change. I guess it was after I had been chief judge for about a year, there was some comment that we did not schedule terms of court in advance enough, and, therefore, it could create problems for lawyers who had cases to argue in the intermediate court. They'd have a conflict, being in two places at the same time. So I had made inquiry to see if that were a major problem and discovered, at that particular point in history, the service courts virtually had no oral arguments. It really was interesting. We went back to 1980 or 1981. You'd find some of the Courts of Military Review never bothered with the oral argument; I was amazed. So I decided I wouldn't worry too much about the scheduling because we weren't going to put them to any real trouble in their scheduling.

But it seemed to me the professionalism of those courts is very high, and I'd be a little concerned with the possibility of upsetting something that's working well. That would be my biggest concern. I think there is something to be said for having courts drawn from all the services and sitting in a single body. I think, though, as things now stand, I would proba-

bly say that there is enough uniqueness to the conditions of the particular services in having Courts of Military Review, now Courts of Criminal Appeals, for each of the military departments.

As for trial judges, I know, at various times, it appeared that the judges in some services might have either a more lenient or a tougher view than those in others. I don't know if that's true anymore either. But I think we're in pretty good shape at the moment. I'd like to see some greater cross-utilization across services of trial judges. I think that could be expeditious and economical, and apparently it has occurred from time to time in different commands, like in Hawaii, Okinawa, Alaska. I'd like to see, perhaps, greater cross-utilization of counsel from time to time. But as I understand it, there are not so many cases tried in any service that you want to have somebody come in from another service and defend the case, because you're depriving one of your own people of an opportunity. So all of that would have to be pretty carefully studied.

What about the question of tenure of the service court and trial judges?

Judge Everett: I think the three-year tenure given in AR 27-10⁶² and elsewhere is certainly going to be very helpful in that regard. The three years ought to provide, in most instances, enough longevity so the person can gain some experience and will not feel too much at risk.

Obviously though, when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the person who is hanging on may favor the government in order to be reappointed.

I think that was a point that came up related to the issue about having a fixed time for service by a chief judge. As you know, it was at the discretion of the President. And that was changed a few years ago partly because of the concern that the chief judge would be anxious to retain his position and, therefore, would be too inclined toward the government. That issue was really sort of a spin-off of an issue that I think had been raised otherwise as to the problems when somebody was nearing the end of their term and might have some incentive to rule for the government to

62. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 8, para. 8-1g. (20 Sept. 1999).

gain re-appointment. That, of course, is one of the disadvantages of not having life tenure.

I think it's a problem, but I think probably the three-year term is adequate for the present, and the military is developing a tradition of re-appointing people who are doing a good job. By "good job," I don't mean just affirming convictions.

Judge Cox: I look at tenure and judicial independence like the Wizard in the Land of Oz. If you want to give the lion courage, give him a medal, and if you want to give the straw man brains, give him a degree. If you want to give judges independence, give them tenure.

I said in my dissent in *Mabe*⁶³ that there's a certain thing you've got to have to be a good judge and tenure and all that doesn't fit into that ingredient; that's character and your moral beliefs in what's right and wrong that gives you a good judge.

Having said that, what I have said publicly on the record and strongly believe is that the military judiciary has evolved to a point in time where it ought to be a career choice, and the way I would view it working would be something like this. A board would be created and people that wanted to opt into the judiciary would apply, and the board would either select them or make a recommendation to the TJAG. I'd prefer to leave the power to make a decision with the TJAG. Let the selectees serve for a year or two years, and then have peer review from other judges who would recommend that they be brought into the "judge corps" of the JAG. At such time, they would be ensured at least the grade of O6, and would get the requisite training and experience and so forth to do that. To me, that would solve the tenure problem, if there is one. But more importantly, it would also create a cadre of people who wanted to be judges, who were trained to be judges, and then you would remove the judges only for good cause shown, again, by peer review or whatever. And then, I think, what would happen would be we would end up with a judicial system in the military that looks exactly

63. Referring to *United States v. Mabe*, 33 M.J. 200, 206 (C.M.A. 1991) (Cox, dissenting in part and concurring in the result). In his dissent, Judge Cox wrote: "A judge who lives by the Code [the ABA Code of Judicial Conduct and the Uniform Code of Military Justice] cannot be unlawfully influenced by outside pressures." Judge Cox concludes near the end of the dissent that "[t]he solution to unlawful influence of military judges is not found in words; it is not found in creating tenure for them or isolating military judges from the world around them. The solution is found in selecting men and women of good character and integrity . . ." *Id.* at 207-08.

like the one we got now, but we'd just recognize it as a "de jure" system, not a "de facto" one.

Article 66 fact-finding power was originally created to ferret out unlawful command influence.⁶⁴ It has steadily grown through the years. Have the service courts overextended their reach with this power?

Judge Cox: I'm working on an opinion as we speak where I'm trying to figure all that out one more time. Do you recall the Supreme Court case, *Jackson v. Taylor*?⁶⁵ A soldier was convicted of murder, my recollection is, and the board of review found the evidence to be inadequate for that but affirmed the rape, and the board of review reduced his sentence from life to twenty years. The Supreme Court said that was perfectly all right to do that, and that was the genesis, I think, of the power of the boards of review and the courts of military review to approve only such sentence that is correct in fact and law.

The *Dubay* hearing,⁶⁶ to get away from reassessment, came about as a result of the government looking for a way to investigate claims of unlawful command influence at Fort Leonard Wood. And so the government really supported the idea of a judge having the power to go out and make fact-finding.

Now how did that get to the Courts of Criminal Appeals having sweeping fact-finding power and resorting to affidavits? I guess necessity

64. See UCMJ, article 66(c), which states: "In considering the record, it [the service Court of Criminal Appeals] may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses."

65. Referring to the case *Jackson v. Taylor*, 353 U.S. 569 (1957). A general court-martial found Jackson guilty of premeditated murder and attempted rape and gave an aggregate sentence of life imprisonment for both offenses. The Army Board of Review disapproved the finding of guilt for murder, approved the finding for attempted rape, and reduced the sentence to 20 years confinement. Jackson filed a habeas corpus petition in federal court, challenging the modified sentence. Both the U.S. District Court and Court of Appeals held that the Board of Review was not required to order a new trial or remand for resentencing, and the Supreme Court affirmed. *Id.*

66. A *Dubay* proceeding is based on the case *United States v. Dubay*, 37 C.M.R. 411 (1967), and is a "limited hearing ordered by the Court of Criminal Appeals to sort out conflicting allegations in cases prior to their resolution and adjudication on appellate review." David D. Jividen, *Will the Dike Burst? Plugging the Unconstitutional Hole in Article 66(c)*, *UCMJ*, 38 A.F.L. REV. 63, 73 (1994). Captain Jividen's article provides an overview of the service courts' fact-finding powers.

is the mother of invention. You start by saying, “Do you have to do a hearing in every case when the facts are pretty clear? When they’re really uncontested? How does that work?” I thought Judge Sullivan did a nice job in *Ginn*⁶⁷ trying to tie in what I would call the power of summary judgment to decide on the record and on the affidavits rather than ordering a *Dubay* hearing in every case. I thought he did a pretty good job on that one, setting out the rules there.

The CAAF has struggled with the problem and tried to leave it up to the Courts of Criminal Appeals. But we’ve recognized that the Courts of Criminal Appeals have fact-finding power, and it seems to work. The flip side of the coin is there’s no standing court-martial out there. You don’t have the Court for the Eastern District of Virginia to send the case back to. You would have to send it back to a convening authority to convene a new court, and then what does the convening authority do? So there’s a lot of cases that probably don’t really need to go back to a convening authority; others that do, and which ones do and don’t is where the controversy seems to be. You never can clearly articulate that. But I don’t think we’ve gone too far with it. I think the Courts of Criminal Appeals have done a good job carrying out their fact-finding power. Always the exception begs the rule but as a rule, I’d say they’ve done a good job. And I think it’s founded in the plain language of Article 66; I think you can stretch it to find it. You don’t even have to stretch it. I think it’s there.

Having said that, I don’t think the defense appellate shops—because they’re not the trial team—have been very aggressive in presenting the rationale for getting a rehearing at the trial level, either on a factual claim of ineffective assistance of counsel, rehearing on sentence, or those kind of things. I think they enjoy fighting the battle in the appellate courts, rather than get aggressive to send it back down because they lose control of it, if it goes back to somebody else. That’s a human phenomenon.

Judge Everett: A lot of courts use special masters for various purposes. And so what they’re doing in the situation in the *Dubay* area in many instances is sending it back to the trial judge. And they can sometimes handle it by affidavits at the appellate court level, but the idea of

67. Referring to *United States v. Ginn*, 47 M.J. 236 (1997), in which CAAF held that the Army Court of Criminal Appeals legally erred in denying Ginn’s post-trial ineffective assistance of counsel claim “by making findings of fact partially based on post-trial submissions.” *Id.* at 238. The error, however, was considered harmless. *Id.* Judge Sullivan analyzed Article 66(c) fact-finding power in his opinion. *Id.* at 242-43.

sending it back to the lower court for more detailed factual scrutiny is fairly typical of appellate judges.

My feeling has been that the power's been used in a judicious way. I don't see anything inconsistent about having affidavits on matters that have not been fully litigated for one reason or another. And, I think the *Dubay* hearing has been a worthwhile means of handling some of the problems, and I think, in many instances, there's certain things you should not settle by affidavits. You should send back and have witnesses actually called in, subject to cross-examination. But, on the other hand, there are some instances where an affidavit makes it clear that there's really no issue, and you can move on pretty rapidly.

XV. Public Courts-Martial

It's fair to say there's a lot of misunderstanding and confusion out in the public about military justice. One proposal to educate the public is to modify R.C.M. 806(c),⁶⁸ which prohibits cameras and video and photographers in the courtroom. What about opening up courts-martial this way?

Judge Everett: I favored having access to our court, the appellate court, by the media. This was based on the assumption that it would not affect the actions of the counsel or of the appellate judges. When you begin doing it at the trial level, you can run into some problems, I gather, and the O.J. Simpson case is certainly an example of problems at their worst. So, the extent to which the televising or the videotaping of court proceedings should take place at the trial level is a matter of choice. I have mixed feelings, and I wouldn't want to go overboard.

At the very least, I'd want to make sure the trial court had authority in that regard and had full authority not to have televising. At the appellate level, I think it could be perfectly desirable. I see no harm in it. There was a request, sort of a strange request, by letter in connection with a new case. Some group wanted to videotape the argument, and this was about two days before the argument was to take place. So it had to be handled informally with just a letter, not a motion. We decided not to go forward on that, although there was one judge who would have done so. My usual reaction

68. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 806(c) (1998) [hereinafter MCM].

would be to say, “Well, we should have made it accessible.” And I learned in that connection that you can’t get an audiotape very readily, if at all, of the argument in our court. And, as I understand it, you can get it in the Supreme Court very readily and very quickly.

I think that’s an area where we probably need to review our procedures. But having videotaping or televising of the argument of the court at the trial level gives me some apprehension, and I suppose I’d be willing to authorize it assuming counsel had no objection and the judge thought it was desirable.

I’m very proud of the system. I think it’s an excellent system. And I like people to know how good it is because then I think they have a much greater confidence in military justice, and the people are willing to abide by the restraints imposed by military justice, much more readily than under other circumstances, etc. So I am an advocate of openness, but I have some caution in this regard.

Judge Cox: I have not been opposed to having cameras in our CAAF courtroom, and I do think it helps educate the public. We get a lot of interesting comments whenever C-Span runs one of our cases, but I think that’s an area that I think the President and the local commander should have a lot of discretion in. Let’s face it: many of our courtrooms around the country are inadequate to handle that type of thing. And the fact would be that only the sensational cases would be the ones that the press and television people will want to come to. So I don’t know. I’m not a real advocate for opening the court-martial to television, even though I acknowledge that it would help the public understand the process.

I’m not so sure that when we’re talking about “the public” we’re not talking about the legal community that we’ve really focused on. One of Jon Lurie’s criticisms⁶⁹ is focused on opening the process to the legal community so they’ll understand it and have some criticism of it, constructive criticism. But I wouldn’t advocate abolishing Rule 806⁷⁰ or changing it. I might leave it to the convening authority or the judge or somebody, to have the option, but it’s probably better to have the rule so people don’t have to worry about it. A lot of judges are very opposed to the cameras in the courtroom; they think it warps the process a little bit.

69. See *infra* note 42 and accompanying text.

70. MCM, *supra* note 68, R.C.M. 806(c).

XVI. International Trends/Court-Martial Panel Selection

Another area of controversy is court-martial panel selection, and perhaps more so now, given the recent developments in the United Kingdom and Canada.⁷¹ These systems have moved away from a system run by convening authorities, to include picking panel members. Interestingly, however, in the United States, in the civilian community, the jury system is one of the things that some scholars and judges attack.⁷² And so the question comes up: Should we follow the trend of countries such as the U.K. and Canada and move toward random selection, or, is this necessarily a good idea, when we see the numerous criticisms of jury trials in our own civilian systems?

Judge Cox: I don't see such developments having immediate impact, but what I do see, and I may—I hope I'm wrong, but I do see the public pendulum swinging from the 1960s when I was practicing military law for the courtroom—from the system being called a kangaroo court system to one in which convening authorities are catching the brunt of the criticism in their exercise of discretion or lack of exercise of discretion. You can look at a number of public cases that have taken place regarding this. I can see convening authorities graciously yielding that authority and getting out of the crossfire of being the decision-makers in this.

But if anything impacts on military justice in this country, it'll be the lethargy that's kind of set in, in the Congress, in the leadership of the various JAG Corps—although they would deny this—the de-emphasis on military justice, the “Lay low; keep low; let's don't think about it; out of sight, out of mind” attitude. You can see a zealous congressman leading a

71. In 1997, the European Court of Human Rights found that the court-martial system used in the United Kingdom violated the European Convention for the Protection of Human Rights because the convening authority's role was too involved in the trial process. See *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997). In 1992, in *R. v. Généreux*, 1 S.C.R. 259 (1992), the Canadian Supreme Court held that Canadian military tribunals were not “independent and impartial tribunals” and thus violated the Canadian Charter of Rights and Freedoms. Substantial changes have been made to both countries' military justice systems since then, greatly reducing the convening authority's role in the process, to include in the selection of members.

72. See, e.g., William T. Pizzi, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1999).

charge for reform, saying “look at these other countries” and just all of a sudden the whole system rolls over.

And why? If this happens, the leaders of the change may hide behind some noble idea that it’s modern due process, but I think the cause, if the change happens in our country, will be because the convening authorities have so much operational responsibility already, so much logistical responsibility. For the convening authorities to catch a bunch of heat because they didn’t prosecute some soldier who was accused of date rape, the convening authorities would just as soon get out of that business and let some JAG take the heat. That public attack on the convening authorities will be the catalyst for change.

If a revolution comes in our system, it would be because of a kind of weak resistance from the leadership of the military, a “let’s just turn it over to the JAGs; they’re doing it anyway” kind of thing. I may be totally wrong on that, but I see that in talking to commanders, talking to friends of military justice from around the world.

As for jury trials, having been a trial judge for seven years before going on the court, I would have to say that, except for one or two cases where I really disagreed with the verdict that the jury rendered, I have great respect for the American jury system. Yet I understand the criticism of it, particularly if you have one of these cases that lasts for a year or two or three years or something like that, one of these big antitrust cases. They’re no longer jurors. They’re employees of the system or something. It’s really contrary to what the system was all about, but I’m a supporter of the American jury system and would make exceptions rather than change the rules.

As far as random selection in the military, I never have been a real champion of that. I’m not opposed to it, if somebody were to come up with a solution. Again, in fifteen years I’ve seen a few cases where the system didn’t work, but usually those get ferreted out and solved. The thing I’ve always been interested in is why the government should have a peremptory challenge since the convening authority has what I call an unlimited number of peremptory challenges, although I’ve been taken to task for using that term.

But it’s very interesting the way the jury system works in the military today. I see in the Air Force a lot of commanders with these elaborate nomination systems, really nominating people who are not off flying or not

off doing something. I imagine the Army is very similar to that, and so I can't make the case for the fact that convening authorities are packing juries right and left. There might be a clerk in the SJA office every now and then who starts packing them or something. I think it's something we have to be sensitive to, but I didn't take a position on the random jury selection, and don't care to now.

Judge Everett: The appearance argument is a significant one, because you do want to have the confidence of people inside and outside of the military. But I've been pretty content, personally, with the way the system seemed to be operating. It's sort of interesting. Back in the 1930s and 1940s, they were having so-called "blue ribbon juries" in civilian courts to handle really complicated issues. In the military, there is sort of a blue ribbon jury to begin with.

I think it was F. Lee Bailey who said that if he had an innocent client, he'd want him to be tried by a court-martial; if he had a guilty client, he'd like to have him tried by a civilian court, because the military officers have an oath that they take as officers, and part of that is to perform their duties later when they become a court-martial member. It's all part of a system that they have sworn into voluntarily. And even with a non-com sitting on an enlisted court, the same thing is true. They probably will take very seriously the obligation to acquit, unless somebody is proven guilty beyond a reasonable doubt. There are some very good features of it.

I've never sat on a jury. Right now, I'm under summons to be a juror, and I sort of hope I can do that, never having done it. I'd like to see a little bit of the jury system from the inside to see how it operates.

My mother, who was a lawyer, sat on a jury; in fact, she was foreman of one on one occasion, a homicide case. She was tremendously impressed with the way the jury used common sense and interacted to get to a good solution. And I've heard other lawyers who had been on juries express confidence in the jury system. So I don't want to disparage juries.

One of the leading experts on juries is here at Duke. He's a sociologist on the law school faculty, Neil Vidmar, and he's made a lot of studies of the jury system.⁷³ And I think he thinks that, basically, it works pretty

73. See, e.g., NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGEOUS DAMAGE AWARDS* (1995).

well. So, as we make the comparison of the court-martial system with the jury system, I don't start out with any strong bias one way or the other, any strong preconception. I think the juries work fine. I really think courts-martial work fine. Can you improve the system by making some of the changes that have been recommended, such as random selection? Certainly I've heard a lot of the discussions, and I gather the results were not very persuasive that there was a need to change the present system.

It does seem clear to me that a malevolent convening authority could play games with the system, and we had cases like the ones over in Germany, I think it was the *Thomas*⁷⁴ case where the court said that command influence is the mortal enemy of military justice, which I think is certainly true. And the selection system now in existence does offer possibilities for command influence. There is no denying it. But I think you balance those dangers against the harm to military operations that may result if you use random selection. You have a much greater likelihood of interfering with military operations if people have to be chosen just by lottery, or something of that sort. I'm inclined to leave things as they are.

I do think there should be some clear authority, either in the *Manual* or in the Code itself authorizing a convening authority to use random selection. However, currently I think the defense could make an argument if it were attacking any random selection used now. Suppose an accused was convicted under one of these experimental programs of random selection, which have been used a couple of times by, I think, the Air Force and the Army? And what if the accused said, "Well, the convening authority did not select the people in accordance with Article 25"?

You could make that argument, so I think there should be a clear authorization that they could use the random selection, if they chose to do so. If a commander feels that he can do that without interfering with his military operations and can have a court-martial that produces real confidence in results, without disrupting operations, I think he should be free to do that. If the matter came up today under the existing rules and Article 25, and so forth, I think it would be an open question. I don't know of any decision directly on point.

74. Referring to *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

So you don't think it's necessary to move in a direction like the UK has, removing the picking of the panel entirely from the convening authority?

Judge Everett: No, I don't. I've got to admit when I first saw it as an Air Force judge advocate, the Code had been in effect a very short period of time, and the system was pretty primitive. I remember the base where I was stationed, the SJA and the prosecutor did, in fact, select the court. Now, they submit the names to the convening authority. I was not part of the process at all as a defense counsel, and I thought that was a pretty lousy arrangement, although I assumed at the time it was just the way things were done. So I think that there has to be some emphasis from the SJAs to try to make sure that the convening authority is not result-driven in the selection of court members and keeps his or her hands off, but I don't think I would change the statute or go as far as some of the proposals would go.

I think if change is going to be forthcoming, it will have to come from Congress. I think that would be pretty hard to persuade Congress to do. The example of what's happening in other democratic societies, like the United Kingdom and Canada, may prove to be very persuasive to Congress. But I wouldn't be betting on it. I do think, though, at the very least, that Congress should give specific authorization for the convening authority to use random selection. Then perhaps, encourage as much experimentation as possible to see whether it has any adverse effect on military operations, did not prove to be inconvenient, and did not seem to be affecting the accuracy of the result reached by the court or the fairness of the sentence. If no adverse results, then I'd say go forward. But that's about as far as I would go.

Incidentally, one thing I've recommended time and again, and it seems to go nowhere, is that there be an option available for a service member to be tried by a court-martial by the members and then to waive trial by the members and have trial by military judge as to the sentence. To me, that does not affect military operations adversely. It brings the military system more into a parallel with the civilian, but allows for it to be done by consent, very much as you can waive other rights. So I think that would be an improvement. I've heard some claims that this is opposed in some quarters because they want to make the service member have an all or nothing option, on the assumption that he or she is more likely to go for a trial by military judge alone for the whole thing, the findings and the sentence. But I've had the impression the Joint Service Committee was going to study that idea, particularly since I've mentioned it several times.

XVII. Court-Martial Panel Sentencing

What about doing away with panel member sentencing altogether, to mirror civilian courts?

Judge Everett: I guess related to that would be the question whether you were trying to have sentencing guidelines for those judges in order to have greater predictability. I suppose one of the reasons I am recommending that at least there be an option to waive the sentencing by the court-martial members if the trial had been by the members, would be to allow an accused at least to have the opportunity for the sentencing by judge alone.

But I'm inclined to leave it as it is. I think probably the more unusual sentences by courts-martial are those that are too light, almost the type of jury nullification. If they are too heavy, then they probably would be cut down by the convening authority. I assume that still occurs, at least it was true according to the past. So I think the situation today is not intolerable, and I'm not sure how much it would be improved by switching the sentencing over to a military judge.

It would be interesting to have some statistical information on that and see what happened with judge alone, and what happened with court-martial members who were all officers, and what happened with one-third enlisted courts. The differences might vary in relation to the particular offense and the activities of the particular defendant and of the victim, but some comparative data of that sort would be very interesting in giving us some insights.

XIX. Post-Trial Problems

Post-trial procedure is an area that CAAF in the last few years has been focusing on. Is there a systemic problem? If so, is there a systemic remedy?

Judge Cox: I would put it this way. If some of the practices I've seen were in civilian practice, you'd see reprimands from the Supreme Court, and lawyer grievance hearings and everything else. It's just malpractice; it's as simple as that. It's just malpractice. People aren't doing what they were told to do by the rules. My solution has been for the Courts of Criminal Appeals to just turn around and send it right back and fix it and don't

get it into the appellate process, but I've been unable to get a majority for that over the years.

It's really not that systemic a problem, however. You see the cases, but there's only five or six out of thousands. And the cases you see are the ones we're making a point. So I don't think it's a big systemic problem. The Navy has an unusual—and I'm not being critical; I'm being sensitive, I hope—circumstance in that they don't have centralized control over the records and over the SJA reviews and all of that. They have legal officers doing reviews. They have a lot of special court-martial convening authorities. So they have really an administrative nightmare getting it right all the time.

Having said that, they've started emphasizing it, the Navy TJAGs, the Navy-Marine Corps courts and everyone else, and so we're starting to see fewer and fewer cases coming out of the Naval service. I'm not patting the Army on the back but we rarely see those kind of cases coming out of the Army because you have a centralized system and you've got controls and you've got SOPs and ways of doing business. We have had clerks of the Army court who will not accept half-baked records and things like that. So I don't see it as a systemic problem; I see it as something we ought to pay attention to. That's basically all.

XX. Military Rules of Evidence 413/414 (Evidence of Similar Crimes in Sexual Assault Cases & Child Molestation Cases)

What is your position as to the workability and validity of Military Rules of Evidence 413 and 414?⁷⁵

Judge Cox: We have a couple of cases pending on them right now. I think the principal criticism of the rules from what I've seen is that they were adopted by Congress without the process working. If you go back and think about the way the Rules of Evidence evolved, the fifty states were operating under basically common law rules of evidence. Some states had codified rules of evidence—this state would have this rule, that

75. MCM, *supra* note 68, MIL. R. EVID. 413, 414. Military Rule of Evidence 413(a) states that "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any manner to which it is relevant." Military Rule of Evidence 414(a) states the same, substituting the words "child molestation" for "sexual assault."

state would have this rule, and federal courts were all operating under whatever rules were in their jurisdictions. So the foremost evidentiary scholars in the country and judges and others got together to build the Federal Rules of Evidence.

When I was a state judge, if there were no other rule, I'd say, "The Federal Rule represents the foremost thinking of the legal community today on what the rule ought to be. I'm adopting it for this case. Any objection?" Usually no objection, particularly in expert testimony. The old common law rules of expert testimony were cumbersome, difficult to work with. So I think the first criticism I would have with 413 and 414 would be that they were adopted without the process working. All the legal scholars who have an idea of what how rules of evidence should play in the courtroom didn't have any input into the game.

Having said that though, I have always wondered whether this type of evidence, particularly the propensity evidence in sexual cases, is character evidence. Or is it something else? And I never have been able to articulate it very well. I have tried to get some psychiatrists involved, whom I have asked, "Do you consider, if someone is a homosexual, is homosexuality a trait of character? If somebody is a pedophile, is that a trait of character? If somebody is interested in having sex with animals, is that a trait of character or is it some other psychological phenomena like left-handedness or blue-eyedness?"

I have never gotten a clear answer. I've wrestled with the question of whether or not this evidence is 404(b) evidence⁷⁶ anyway. And if it's not, then you don't have to worry about the character side of it. Whether it is or isn't, you have to look at legal relevance in any event. So the bottom line is: I don't know how our court will actually shake out on the rules as far as some of the arguments that are being made about them, but I think

76. Referring to Military Rule of Evidence 404(b), which states:

Evidence of other crimes, wrongs, or acts is not admissible to prove character of a person to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident

MCM, *supra* note 68, MIL. R. EVID. 404(b).

that to the extent that judges still have the gate-keeping under M.R.E. 403,⁷⁷ the rules aren't going to be abused.

Would I have adopted the rules if I were the decision-maker? I'm not sure whether I would or wouldn't, whether I would have just let the evidence continue to flow in under the 404(b) analysis. Most of this evidence would come in, if you think about it.

The other side of the coin on that evidence is: once it does come in, I think it changes the dynamics in the courtroom pretty strongly in favor of the prosecution. I think it's very difficult for someone who is a prior sexual predator to overcome that in the trial where he's being accused of that again. I think it's very difficult. But I think the M.R.E. 403 balancing test still has to be done. I just wonder how many judges would ever exclude it under that. It would take a pretty strong judge to say, "Well, I know you've got two or three other acts of rape there and I know he's charged here, but, if you let that in it's too prejudicial."

The other interesting argument that can be made, I think, is an equal protection argument. And that is: if one's bad acts or one's sexual propensities are relevant to prove that at the time and place of the charge, that person is likely to have done it because he is a bad actor or because he has such a sexual propensity, then why isn't it also relevant that the victim in a rape case should be judged with her bad acts as baggage and her sexual promiscuity as baggage? What's the difference? What's the difference in the legal and logical relevance between the two, other than one's a victim and one's the accused? And that raises to me an equal protection argument that would have to be made in the context of that battle. Here you have the person accused of sexual misconduct and here you have the victim and you want to introduce prior sexual misconduct as to her. The judge lets the male's in and keeps the female's out. Then you've got the battle, and I haven't seen that case, maybe there's one and maybe you've read one out there, but I haven't seen that case clearly. I think that's going to be an interesting case if it ever gets litigated.

77. Referring to Military Rule of Evidence 403, which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* MIL. R. EVID. 403.

XXI. Military Commissions

Judge Everett, you've stated that you are in favor of using military commissions⁷⁸ under Article 18 of the UCMJ⁷⁹ to try law of war offenses and U.S. civilians overseas. How would that work and how it would impact on our military justice system?

Judge Everett: If we are using commissions for civilians, say, a civilian employee who committed a war crime, then I don't see how it would have any impact on our current system at all. You're still trying your service members by court-martial. If it were used for ex-service members, then it would sort of help bridge the gap created by the *Toth*⁸⁰ case.

My understanding is that, after the My Lai episode, and perhaps with reference to some other alleged war crimes, one of the services was proposing proceeding with military commissions against the ex-service members who could no longer be tried by court-martial utilizing the jurisdiction that, supposedly, existed under the Law of War. And that might be the best alternative under some circumstances. So that I think the military commission has its use.

When the House of Representatives was considering it in 1996, I had written a little bit on this subject, and I was contacted by one of the counsel for the judiciary committee—for some reason, it was Immigration Subcommittee of Judiciary, if I'm not mistaken. They asked my view about creating jurisdiction in Article III Courts to try war crimes. I said, "That's fine, but be sure you don't have an implied repeal of the authority under Article 18 to use military commissions for violations of the Law of War." Because it seemed to me if they did that, Congress would be shooting itself in the foot, as it were, by eliminating something which can prove to be

78. See, e.g., Robinson O. Everett, *Possible Use of American Military Tribunals to Punish Offenses Against the Law of Nations*, 34 VA. J. INT'L L. 289 (1994); Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994).

79. Article 18 of the UCMJ establishes jurisdictions of general courts-martial. The relevant portion states: "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." UCMJ, article 18 (2000).

80. Referring to *Toth v. Quarles*, 350 U.S. 11 (1955), in which an Air Force enlisted member, after having been honorably discharged was arrested five months later for murder and conspiracy to commit while an airman in Korea. The Supreme Court ruled that the former airman "could not constitutionally be subjected to trial by court-martial." *Id.*

quite useful in favor of something which may be useful in some cases, but certainly has limitations. You could set up a military commission in Kosovo, I suppose; you can't have a federal district judge go over there and try a case.

Interestingly, by the way, when I expressed my concern about implied repeal, I was told by counsel for, I think, the House, from one of their legislative counsel, that in the federal courts, there is no doctrine of implied repeal. They provided a little legislative history to back it up; I think a letter from Judith Miller as General Counsel⁸¹ said something to that effect, "There is no implied repeal."

So, under the UCMJ, commissions could try people for Law of War offenses regardless of their status?

Judge Everett: That would be my interpretation. As I recall, the Supreme Court in the *Quirin*⁸² case took comparable language in the Articles of War and said that Congress had, basically, ratified application of the Law of War in dealing with war criminals like *Quirin* and the other German saboteurs. So that I think you can do that.

In any event, I think a military commission could be used under some circumstances today. I've made the suggestion that, if we should ever become involved with the International Criminal Court (ICC) and are concerned about Americans being tried by the International Criminal Court, we are in a position to utilize complementary jurisdiction, to some extent, by saying, "Yes, we can try these war criminals by military commission. We do have the way to do it; therefore, we get the first crack at them. And the ICC does not get an opportunity to try them."

How would you compare a tribunal such as the ICC with military commissions?

Judge Everett: The real concern, as far as trial by the ICC or by one of these international tribunals established ad hoc for a particular area, one

81. Currently General Counsel to the Department of Defense.

82. *Ex Parte Quirin*, 317 U.S. 1 (1942). *Quirin* was a German saboteur who infiltrated U.S. territory to destroy industries and war effort activities. He was captured and tried by a military commission in accordance with the law of war, and the Supreme Court upheld the ability of the military commission to do so. *Id.*

of the real concerns there is not so much feasibility of trial by the international tribunal, but the fairness of the trial, the circumstance of Americans being turned over to an international court that would not provide the same sort of trial they would receive in an American court.

What about concerns of due process at commissions, such as the fact that the Military Rules of Evidence would not necessarily apply?

Judge Everett: In the past, they've been done ad hoc pretty much with specific parameters, and I would think that making such rules applicable would be part of the executive order establishing a particular military commission. To me, it would seem a logical way to proceed. My recollection is, from what I've read, that when General Yamashita was tried by military commission,⁸³ they used a lot of hearsay evidence such as newspaper articles from the Philippine newspapers. I think that's a little bit questionable. But I think one of the big advantages of the military commission now is that it would enable us to take advantage of complementary and basically say we'll try these people ourselves, instead of turning them over for trial by an international tribunal.

I think a military commission can administer justice, and I would think that it would be worthwhile to use the Military Rules of Evidence on the assumption that many of the people involved would be familiar therewith, and also that it's a good, modern updated system, very parallel to the Federal Rules of Evidence.

What about the concern that a lot of what's international law is admittedly very vague, such as trying a commander for a failure of "command responsibility"? Is international law concrete enough for us to launch forays into making these determinations of guilt or innocence over people?

83. General Tomouki Yamashita commanded the 14th Army Group of the Japanese Army in the Philippines in 1944-45. He was charged with failing his responsibilities as a commander in permitting brutal atrocities to be committed by his soldiers, thereby violating the law of war. He was subsequently convicted and sentenced to death by a U.S. military commission, and hanged in 1946. The Supreme Court upheld the conviction and sentence. *In re Yamashita*, 327 U.S. 1 (1946).

Judge Everett: You have a lot of treaties that help supplement the law of war—The Hague Convention, Geneva Convention, things of that sort, so you've got some things flushing some of that out. I think that somebody's going to be making those forays and the International Criminal Court will be making them before we do it. So I think personally that we should make as broad a claim of jurisdiction as possible, predicated on customary international law and the Law of War. I view it as a sort of defensive mechanism. I don't think it will have much impact on people who are on active duty because most of the alleged offenses would be included within proscribed crimes, like murder and rape. But it could be of value as to people who are not subject to jurisdiction anymore. The ex-service member or the civilian—not so much the civilian dependent, but the civilian employee accompanying the military in connection with some type of operation. So I think it has some utility. There are going to be complaints, of course, that it's victor's justice, no matter what type of tribunal administers it when you get right down to it. But I think it's important to have that as a potential weapon.

XXII. Recommendations for the Future

What, if any, changes would you propose to the current military justice system?

Judge Cox: Two suggestions I've made I think would improve the system. One, is the establishment of a permanent judiciary at the trial and service court levels, which I talked about earlier.⁸⁴ The other one is that there is no comparable provision in the Uniform Code of Military Justice or in the Rules for Courts-Martial to the Federal Post-Conviction Relief Act or the State Post-Conviction Relief Acts. Therefore, we're left in my judgment, without standards or without rules or without procedures on how to handle collateral attacks on courts-martial. By the rule of necessity; we've done it via *Dubay*.

But we've had extraordinarily important cases resolved on collateral attack. The *Curtis*⁸⁵ case and its ineffective assistance of counsel is an example. We sent that back to the court with the option of ordering a rehearing or reassessing and that turned into a controversy too.

84. See *supra* notes 63-64.

85. *United States v. Curtis*, 33 M.J. 101 (1991) (remanded), 46 M.J. 129 (1997) (on reconsideration).

My point is, had there been an established procedure, then Curtis would have had to follow that. He would have had to file his claim for ineffective assistance, not with a federal appellate court but with a fact-finder and the fact-finder would have had to decide whether he had sufficient cause to have a hearing. And that's the way it's done in every state and every federal court in this nation on collateral attacks, and we have no such procedure. And I've urged people to adopt it.

The third thing that I would—I've urged the Judge Advocates General to do—and that is establish a fixed training course for appellate defense counsel. I would like to see it as a residential course at one of the justice schools, but I would have no objection to the alternative of it being held in Washington or some place else. I don't have any problem with that, but I've urged them to establish a course with a syllabus and some real training patterns.

Those are three suggestions that I've had that I think would improve it. I'm not in favor of a constitutional convention to relook at all of military justice and all of that. I don't think anybody can make a case for any particular aspect of it not working well. You're always going to have criticism where the convening authority's selecting the members, but no one's come up and articulated a better solution for that. And given the responsibility of a commander to be ready to fight and carry out his mission or her mission, then I think the corollary to that is they've got to be able to decide what the best utilization of their manpower—who has range duty, who has staff duty officer, and who has court-martial duty. So I don't have much problem with that. But other than that, I think the system is in good shape, and I think the lawyers do a good job out there defending their clients and the prosecutors do a good job prosecuting the cases. Our court, at least over the last years I've been on it, has just been kind of tweaking the system. We haven't tried to reinvent it or rebuild it or anything else.

Judge Everett: I think I have a variety of recommendations that I've already mentioned, none of which looms very, very high. But I would enact legislation that would clarify and strengthen the supervisory role of the Court of Appeals for the Armed Forces, as well as the Courts of Criminal Appeals with respect to the military justice process.

Item two, I would provide centralized judicial review of administrative discharge activity, and probably some other types of significant administrative action. My own choice would be to have that review centralized in the Court of Appeals for the Armed Forces, but if not there, then

in the Court of Federal Appeals. Thirdly, I would go ahead and create Article III status for the court, but that's not a burning issue.

Next, I would consider making the change in providing the option whereby an accused could utilize an option for trial, for sentencing by the military judge, even though he or she had been tried by the members of the court-martial.

Next, I would authorize, but not require, convening authorities to use some type of random selection.

Next, I would expressly create jurisdiction for federal Article III courts to try ex-service members and civilian dependents or employees, and I would certainly consider use of military commissions of some sort. Probably in this particular stage with an international tribunal there that I guess has jurisdiction, I think we'd be rocking the boat too much to do that, but I think we should at least look at that as a viable option for any future deployment. It may be helpful in some respects.

One other thing they need to do: they need to press forward to get the funding for continuation payment for judge advocates, so that they have more money to stay in the service and pay off those loans for their legal education.⁸⁶

86. On 10 May 2000, the Assistant Secretary of the Army (Manpower and Reserve Affairs) approved the implementation of the Fiscal Year 2000 (FY00) Judge Advocate Continuation Pay (JCAP) Plan. It is open to certain junior judge advocate officers and allows certain junior judge advocates to apply for continuation pay for \$10,000 or \$25,000, depending on career status and years of service. *See* Personnel, Plans and Training Office, United States Army Judge Advocate General's Corps (visited 20 July 2000) <<http://www.jagcnet.army.mil/PPTO>>.

**THE TWENTY-EIGHTH ANNUAL
KENNETH J. HODSON LECTURE:¹**

JUDICIAL DECISION MAKING

SUSAN J. CRAWFORD

CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES²

I would like to address the rather broad topic of judicial decision-making. More specifically, I will describe how I, as one individual appellate judge, approach deciding a legal issue that is before the Court of Appeals for the Armed Forces, and how that may help you as judges and counsel. Additionally, I will also make a few comments on *United States v. King*³ and on the Fiftieth Anniversary celebration of the Uniform Code of Military Justice (UCMJ).

While I do not think that it would be appropriate for me to talk about the judicial philosophies of my colleagues, I do hope that I can lay out my own views in providing a conceptual approach to judicial decision-making. Judicial decision-making and opinion writing is in part a question of collegiality. Chief Justice Rehnquist has said that he enjoyed writing his book on impeachment because he did not have four other individuals telling him how to do it. That says a lot, because what we seek to do in writing opinions is gather a majority for the opinion.

1. This article is an edited transcript of a lecture delivered on 19 May 2000 by Chief Judge Susan J. Crawford to members of the staff and faculty, distinguished guests, and officers attending the 48th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after Major General Hodson who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

2. B.A., Bucknell University; J.D., New England School of Law, *cum laude*; Principal Deputy General Counsel, Department of the Army, 1981-1983; General Counsel, Department of the Army, 1983-1989; Inspector General, Department of Defense, 1989-1991.

3. No. 00-8007/NA, 2000 CAAF LEXIS 472 (C.A.A.F. May 8, 2000).

The primary purpose of our decision-making is to interpret the law so that it is predictable to members of the bench and bar. A judge should not use the opportunity merely to pursue his or her own private aims or views. This requires an accurate appreciation of the requirements of the military community as well as the application of good common sense.

When you ascend to the bench, you are not required to discard the knowledge you have gained over the years. You may have been counsel for the defense or for the government, a trial judge, a staff judge advocate (SJA), or held other positions. Your experience is important. As Justice Holmes once declared, “The life of the law has not been logic: it has been experience.”⁴

In the final analysis, our role is to enforce the Constitution, statutes, executive orders, service directives, and common law while ensuring truth-finding, as elusive as that goal may be. This means protecting the rights of defendants, protecting the rights of victims, and ensuring that our military can enforce our national interests throughout the world.

I believe that it is vital to our judicial decision-making for us to have a conceptual approach that provides us with a method of analyzing and deciding legal issues. We begin with the premise that the purpose of a criminal trial is truth-finding. That is, we seek to find the truth within a framework of certain rules. These include constitutional, manual, ethical, regulatory, and common law rules.

Sometimes it may appear that some of these rules, such as defense counsel’s ethical obligation zealously to represent his client, may conflict with the goal of truth-finding. But, I submit to you that this ethical obligation is a part of our truth-finding quest in an adversarial criminal justice system. The same can be said for constitutional and *Manual for Courts-Martial* provisions that protect individual rights and limit law enforcement activities.

How and when to apply these rules are not only part of the life-blood of the military justice system, but also the lodestar for appellate issues. How trial and appellate courts decide these issues can have reverberations throughout the system. The hallmark of good judicial decisions then is consistency, rationality, and coherence.

4. OLIVER W. HOLMES, *THE COMMON LAW* 1 (1881).

These characteristics—consistency, rationality, and coherence—are of course important in order to insure stability and predictability for those with responsibilities in the military justice system. As an appellate judge, trial or defense counsel, or even a commander or his SJA, you know how important stability and predictability can be as you analyze the issues and strategies before you in a particular case.

I believe that we achieve stability and predictability if we have a conceptual foundation from which to make decisions. It is a starting point with a rather straightforward building block approach that has different levels.

There is an old saying that your starting point will, on many occasions, determine what road you will take and ultimately, your final destination. For me, the starting point for our conceptual foundation is what I have frequently referred to as the “hierarchy of sources of rights.” That is, the sources of rights that service members enjoy.

I have emphasized the hierarchy in my opinions because of its importance throughout the judicial system, whether at a court-martial, the Supreme Court, or any other appellate court. At the top of the hierarchy is the United States Constitution, followed by federal statutes, including the Uniform Code of Military Justice. Next come executive orders, including the Military Rules of Evidence (MRE) and Rules for Courts-Martial (R.C.M.), followed by Department of Defense (DOD) and service directives, and, finally, common law, that is, case law.

Each source of a right falling below the Constitution must satisfy the higher source and remain consistent with that source. Note, however, that a lower source of rights—such as a service directive or a *Manual* provision—may grant greater rights than required by the Constitution or another higher source. If we apply the hierarchy, an objective, rational approach will resonate throughout the legal community and with the public. When our questions are not answered by looking at the hierarchy, then we will look at the values and interests meant to be protected by the Constitution, rules, and other sources of rights.

The hierarchy also highlights the type of government we have and shows trust, rather than distrust, in democracy and the separation of powers. The task of rule-making is left to Congress and of enforcement of those rules to the President. The role of the judiciary is to interpret those rules within certain formal and institutional norms. Justice Holmes once

said that the law is something more than some “transcendental body of law outside of any particular state.”⁵ The law is a prediction of what trial judges and appellate judges will do in any given case.⁶

There are basic ingredients that a judge uses to ensure that what happens is predictive, be it the *Bench Book*, the *Manual*, the UCMJ, the Constitution, court decisions—or all of these tied together. In a sense all of you as judges seek to predict what will happen—both at the trial level as to the findings when you are not the fact-finder—and what will happen on appeal. The question is how do you increase your probabilities of being correct. Without the hierarchy, our decisions might be based upon intuition or individual moral values. Predictability and stability would be cast to the wind. This would amount to a distrust of democracy and ultimately lead to a distrust of what courts do.

I do not mean to imply that the law does not have morality attached to it. It does. But, generally, the decisions as to morals, values, and other factors are made in the first instance by Congress in the Legislative Branch and not by the courts. If the law depended upon individual moral values, it would be hard to justify and difficult to respect. Stated differently, to act solely on an individual sense of right or wrong is to confuse the bench and bar as we all struggle to interpret the law.

We build on the past. This is an endless process, one that hopefully will better society. But in so doing, we must drive in our own lane and be mindful of the separation of powers. A court can—of course—always try to articulate a rationale for over-stepping the separation of powers doctrine. But I believe the recent *Clinton v. Goldsmith*⁷ case teaches us that a court does so at its peril.

Courts should stick to the law and not make decisions based on politics or value choices. Neither should decisions be based upon personal views or preferences as to a particular case, set of facts, defendant, or other subjective criteria. Requiring courts to set forth sound reasons for their decisions acts as a control on the authority of courts and obedience to legal doctrine. This is vital to the functioning and constraining of the judiciary’s exercise of power. It is law—and not personal politics or preferences—

5. *Black and White Taxi and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). See HOLMES, *supra* note 4.

6. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457-61 (1897).

7. 526 U.S. 529 (1999).

that should control. Where there are gaps in the law, courts may suggest that Congress or the President change a particular rule to conform with what is considered to be a just result.

Let us examine the hierarchy of sources of rights more closely. In *United States v. Guess*,⁸ the court discussed the hierarchy as cited in previously decided *United States v. Taylor*⁹ and *United States v. Lopez*.¹⁰ Part of that discussion is as follows:

The military, like the Federal and state systems, has hierarchical sources of rights. These sources are the Constitution of the United States; Federal Statutes, including the Uniform Code of Military Justice; Executive Orders containing the Military Rules of Evidence; Department of Defense Directives; service directives; and Federal common law. Unlike the Federal Rules of Evidence, Section III of the Military Rules of Evidence “codifies” the constitutional rules. Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual; for example, [MRE] 305(e) as to notice to counsel, or Article 31, UCMJ, requiring warnings to suspects not in custody.

We have employed the hierarchy in *United States v. Davis*,¹¹ *United States v. Marrie*,¹² *United States v. Johnston*,¹³ *United States v. Kossman*,¹⁴ *United States v. Lopez*,¹⁵ and in the dictum in *United States v. Williams*.¹⁶

Johnston focused on the purpose of a criminal trial and the admissibility of so-called “negative” urinalysis results. These negative results were not true negatives, but rather tests in which the subject’s nanogram level fell below the high DOD cutoff for a positive determination.

8. 48 M.J. 69, 70 (1998).
 9. 41 M.J. 168 (C.M.A. 1994).
 10. 35 M.J. 35, 39 (C.M.A. 1992).
 11. 47 M.J. 484 (1998).
 12. 43 M.J. 35 (1995).
 13. 41 M.J. 13 (C.M.A. 1994).
 14. 38 M.J. 258 (C.M.A. 1993).
 15. 35 M.J. 35 (C.M.A. 1992).
 16. 43 M.J. 348 (1995).

*United States v. Arguello*¹⁷ had been read not only to preclude the government's introduction in the first instance of these negative results, but also to prohibit the government from rebutting a defense presentation that the defendant tested negative. The *Arguello* majority elevated the DOD and implementing Air Force regulations to the level of a constitutional exclusionary rule. This result essentially turned the hierarchy upside down and ignored the fact that the admission of scientific evidence is governed by the Military Rules of Evidence. The absurdity of this result was best illustrated by Chief Judge Cox during oral argument. He held up a pencil and said "this is a pencil." Then he added that if we broke it in two, it would still be a pencil.

Similarly, just because test results falling below the high DOD cutoff level are called "negative" does not mean that the accused did not use drugs. Therefore, if the defense in its case-in-chief introduces evidence of a negative urinalysis to imply that there was no trace of drugs in the defendant's urine, the government ought to be able to rebut by explaining what the negative results really mean. Otherwise, the truth-finding purpose of a trial would be undermined. As the government recognized in its Answer to Final Brief:

If an accused can testify that he has never used drugs, although there is the presence of them in his 'negative' urinalysis, and the Government is not permitted to rebut that testimony, the accused can lie without any fear of being confronted by the truth.

What could more clearly undercut the truth-finding purpose of a criminal trial! Additionally, the *Johnston* majority asserted that "contrary to *Arguello*, a violation of the DOD Directive should not lead to the exclusion of evidence."¹⁸ If the DOD wants that result, then it should say so.

In *United States v. Kossman*,¹⁹ we implicitly followed the hierarchy in rejecting the *United States v. Burton*,²⁰ ninety-day speedy trial rule. You may recall that *Burton* was decided at a time when there was no R.C.M. speedy trial rule so the court had established a ninety-day rule.

17. 29 M.J. 198 (C.M.A. 1989).

18. *Johnston*, 41 M.J. at 16.

19. 38 M.J. 258 (C.M.A. 1993).

20. 44 C.M.R. 166 (C.M.A. 1971).

Thereafter, the President adopted the R.C.M 707²¹ speedy trial rule. We implicitly applied the conceptual hierarchy analysis in holding that the R.C.M rule—as a higher source on the hierarchy—trumped the court-made ninety-day rule in *Burton*.

Likewise, *United States v. Lopez* expressly followed the hierarchy in upholding the *Manual* good-faith exception to the exclusionary rule.²² Over an eight-year period the court had had the good faith exception before it,²³ but had refused to adopt it. *Lopez* was the first case to apply the *United States v. Leon*²⁴ rationale to the military.

I should point out that not all of the judges of our Court have expressly embraced the hierarchy of sources of rights, even though it seems to be hornbook law discussed by Professors Wayne R. LaFave, Jerold H. Israel,²⁵ and Professor Edward J. Imwinkelried.²⁶ I suggest that that might be one reason why our court has issued so many separate opinions over the past few terms.

While the high number of separate opinions may be understandable, they are a bit unsettling at times. I think—philosophically—the court is searching for a foundation for its opinions in the Constitution, the UCMJ, the *Manual*, and other federal case law. In my personal view, if we could reach a better consensus on the hierarchy and sources of rights, as well as on the interaction of these various sources, we could go a long way in cutting down on separate opinions and potential confusion in the field.

Adopting the hierarchy as a conceptual framework has another benefit as well. By relying on the hierarchy of sources of rights for guidance in decision-making, our role as jurists is maintained. We do not step across the separation of powers boundary by acting as legislators in making rules. Thus by following the hierarchy, we can properly assume our role as jurists pursuant to Article 67 of the UCMJ.

21. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998).

22. 35 M.J. at 39-40 (C.M.A. 1992).

23. *United States v. Queen*, 26 M.J. 136 (C.M.A. 1988).

24. 468 U.S. 897 (1984).

25. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.5 at 29 (2d ed. 1992).

26. EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE § 2 at 2 (3d ed. 1998).

Before I go further, I believe it is important to address the scope of the constitutional protections of a service member—specifically, whether the Bill of Rights applies to the military. In *Lopez*, which was one of the first opinions I authored, I suggested in a footnote that that issue was still open.²⁷ I noted that although the Supreme Court has assumed that most of the Bill of Rights applies, it has never expressly so held.²⁸ The resistance to that footnote in some quarters was swift and forceful. From the reaction within our Court one would have thought that the military justice system was going to collapse. Yet, despite burning up the Westlaw lines for several days, no one could find a Supreme Court holding to the contrary.

In separate opinions, one of my colleagues disassociated himself from any implication that the Bill of Rights does not apply to the military.²⁹ Another colleague said that my discussion of the application of the Bill of Rights was “tardy” since our court had already so held in *Jacoby* in 1960.³⁰

Actually, *United States v. Jacoby*³¹ is interesting because our court held that the Bill of Rights applies, “except those which are expressly or by necessary implication inapplicable.” That is hardly an unqualified application of the Bill of Rights. We know, for example, that the right to indictment by grand jury is expressly inapplicable to members of the armed forces.³² Likewise, the oath requirement of the Fourth Amendment does not apply. “No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval Forces”³³

Furthermore, it took our court nine years—from 1951 to 1960—to reach the result in *Jacoby*. Nevertheless, my raising of the issue in *Lopez* stirred some controversy at the Court. In a later opinion by one of my colleagues, I was accused of trying to “drive a wedge” between service members and their constitutional rights.³⁴ That gave rise to some good-natured kidding by some of my other colleagues and my staff who dubbed me with the nickname, “wedge-driver.”

27. *United States v. Lopez*, 35 M.J. at 41 n.2.

28. *Id.*

29. *Id.* at 48 (Sullivan, C.J., concurring in result).

30. *Id.* at 49 (Wiss, J., concurring in result).

31. 29 C.M.R. 243 (C.M.A. 1960).

32. U.S. CONST. amend. VI.

33. *Id.* amend. IV.

34. *United States v. Taylor*, 41 M.J. 168, 174 (C.M.A. 1994) (Sullivan, C.J., dissenting).

With this background, you can imagine my great feeling of vindication about a year later when the Supreme Court handed down its *United States v. Davis*³⁵ opinion. In writing for a majority of the Court, Justice O'Connor noted in a footnote: "We have never had occasion to consider whether the Fifth Amendment privilege against self-incrimination, or the attendant right to counsel during custodial interrogation, applies of its own force to the military"³⁶

Of course, Justice O'Connor went on to say that it was not necessary to resolve the question of the applicability of the Fifth Amendment to the military because of MRE 304.³⁷ She also acknowledged that our court had already held the Fifth Amendment to be applicable.³⁸ Thus, because the parties did not contest the point, the Supreme Court could proceed on the assumption that its precedents apply to courts-martial. As you may have noticed, I have not missed an opportunity to cite Justice O'Connor's footnote.³⁹ I also have not heard of anyone calling her a "wedge driver."

Shortly after the release of *Davis*, I was equally delighted to read the *William and Mary Bill of Rights Journal* article authored by Fred Lederer and Fred Borch entitled, "Does the Fourth Amendment Apply to the Armed Forces?"⁴⁰ The authors conclude: "It is incredible that in the late twentieth century, it is not absolutely known whether the Bill of Rights, and in particular the Fourth Amendment, apply to those sworn to defend it."⁴¹

In *Loving v. United States*,⁴² the Court on at least four occasions in three separate opinions assumed that the Bill of Rights apply. I think from your perspective it is certainly the safe approach—and indeed the desirable approach—to assume that most of the protections of the Bill of Rights do apply to members of the armed forces. The 1960 *Jacoby* case from our court is still good law and I certainly perceive no movement to change that approach.

35. 512 U.S. 452 (1994).

36. *Id.* at 457 n.*.

37. *Id.*

38. *Id.*

39. *United States v. Taylor*, 41 M.J. 168, 170 n.2 (C.M.A. 1994).

40. Fredric I. Lederer & Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 WILLIAM & MARY BILL OF RIGHTS J. 219 (Summer 1994).

41. *Id.* at 232.

42. 517 U.S. 748 (1996).

Additionally, because the Rules for Court-Martial and the Military Rules of Evidence have codified most of the constitutional protections—and in many instances have gone beyond what is constitutionally required—it is hard to imagine a scenario that would be ripe for Supreme Court review. In most instances the Rules provide a more than adequate as well as an independent basis for resolving an issue. Therefore, Supreme Court review of the applicability of the Bill of Rights appears to be unlikely.

The discussion regarding the Bill of Rights is important, however, in determining how to conduct a conceptual analysis of the issues raised. The analysis focuses first on *whether* to apply a constitutional protection, and—if so—*how* to interpret and apply the right.

There are various approaches to determine how to apply constitutional rights:

- an historical approach,
- a contemporary approach,
- a definitional approach,
- an expectation of privacy approach, or
- a balancing test approach.

I mention the historical approach because recently, in *Wilson v. Arkansas*,⁴³ a Fourth Amendment “knock-and-announce” case, the Supreme Court looked at the original intent of the framers. Also in *Veronia School District v. Acton*,⁴⁴ a school search case, the Court made reference to the practice at the time of the adoption of the Constitution. The point is that one must consider these various approaches in determining whether a right applies and, if so, how to apply that right.

Let us now turn to some specific issues and cases and apply the conceptual analysis I have been discussing. The first area is eyewitness identification. In *United States v. Webb*⁴⁵ our court noted that there are four potential attacks defense counsel can make on eyewitness identification. These are:

- (1) a Fourth Amendment attack,
- (2) a Fifth Amendment self-incrimination attack,

43. 514 U.S. 927 (1995).

44. 515 U.S. 646 (1995).

45. 38 M.J. 62 (C.M.A. 1993).

- (3) a Fifth Amendment due-process attack, and
- (4) a Sixth Amendment right to counsel attack.⁴⁶

A conceptual analysis of this issue means analyzing the case to see if any of those attacks would be viable.

More recently, in *United States v. Rhodes*⁴⁷—another eyewitness identification case—the Fourth Amendment attack was noticeably absent. Whenever your client is asked to go down to the criminal investigation office, unless it is a voluntary consensual appearance, there is a Fourth Amendment interest. Too often prosecutors and defense counsel forget that.

When there is an allegation of a violation of the Fourth Amendment—or for that matter of the Fifth Amendment self-incrimination or Due Process Clause—both sides must determine whether there are alternative grounds for admissibility or an independent source for the evidence.

While I have addressed the four potential attacks on eyewitness identification, bear in mind that even if one or more of these attacks is successful, if the government can show an independent source for an in court identification, that identification will still be admissible.⁴⁸ How the independent source doctrine works and how it might be applied by counsel and judges brings us to the broader issue of the Fourth Amendment.

In the Fourth Amendment area, trial judges preach to counsel “don’t just give me one basis for admissibility.” It reminds me of *United States v. Copening*,⁴⁹ in which the judge granted a motion to suppress. Later, in the hallway, the prosecutor approached the judge and said that he had other alternative theories of admissibility that he wished to present. The judge replied, “Well, you should have presented those at the initial hearing.”

That is good advice for trial and appellate judges as well. Trial judges should not assume that they know what the appellate courts are going to do in a particular case. I think that was adequately demonstrated recently by our *United States v. Lincoln*⁵⁰ and *United States v. Kaliski*⁵¹ opinions.

46. *Id.* at 67.

47. 42 M.J. 287 (1995).

48. *See, e.g.*, *Stovall v. Denno*, 388 U.S. 293 (1967).

49. 34 M.J. 28 (C.M.A. 1992).

50. 42 M.J. 279 (1995).

51. 37 M.J. 105 (C.M.A. 1993).

In *Kaliski*, all five judges agreed that standing on a patio and looking through a gap in the blinds at the accused and his paramour constitutes a violation of the right to privacy. However, I parted company with the majority and asserted that an issue remained as to whether there was an independent source for determining the identity of the paramour who was a witness against the accused.⁵² That doctrine had not been explored at trial. Yet the record revealed that there was very extensive evidence gained two months prior to the illegal presence on the patio that the police knew the identity of the defendant's paramour.⁵³ Unfortunately, rather than authorizing a rehearing on this issue, the court dismissed the charges.⁵⁴

Considering alternative grounds of admissibility is equally important for the bench and bar in the Fifth Amendment and Article 31 areas. In *United States v. Kosek*⁵⁵ alternative grounds for admission of evidence seized from the accused were not addressed. There the accused was suspected of involvement with illegal drugs. The agents also had obtained information that the accused had a 44-magnum colt pistol. They finally located him at a bar and asked him to step outside. When they started doing a pat down, the accused reached into his jacket pocket. Both agents—apparently concerned about the accused's pistol—immediately grabbed him and one agent asked, "Where is it?" The accused then produced a straw and a small round container with drug residue.

At trial the judge suppressed the production of the container and straw. The government, of course, appealed the suppression under Article 62. However, neither the question of whether there was a custodial interrogation nor whether the statement was part of a public safety exception was addressed. Nor did the judge determine whether the production of the container and straw were testimonial acts.

Kosek demonstrates that if the case had been analyzed in terms of the conceptual issues involved—that is, (1) was there a substantive right involved?, (2) was there a requirement for a rights warning pursuant to *Miranda* and Article 31?, and (3) was there an exception to the rights warning requirement?—it may well have saved two appellate courts from

52. *Id.* at 110 (Crawford, J., dissenting).

53. *Id.*

54. *Id.* at 110.

55. 41 M.J. 60 (C.M.A. 1994).

examining the case. As part of analyzing an issue in the exclusionary rule area, we should also consider the partial severance doctrine.

In *United States v. Camanga*,⁵⁶ the court adopted the partial severance doctrine. Under this doctrine, evidence used to establish probable cause, obtain a search warrant, or make a stop is partially tainted. The courts can then excise the tainted evidence and reevaluate the remaining information to determine if the appropriate probable cause standard was still met for the seizure or search.

I cite these examples because I believe a greater part of our work lies in trying to convince others of the hierarchy and the power of its conceptual analysis. That analysis has its roots in the wisdom and foresight of our Founding Fathers, and the values and objectives for which they strove.

As I mentioned earlier, the failure to follow the separation of powers doctrine has led to a recent grant of certiorari and reversal by the Supreme Court. This case was *Clinton v. Goldsmith*.⁵⁷ Had we been true to our charter, this case would not have reached the Supreme Court.

The challenge now for the bench and bar in the wake of *Goldsmith* is to determine just how broadly that case should be applied. Recently, our Court had occasion to consider that issue when it was before us on an extraordinary writ in *United States v. King*.⁵⁸ You may be aware that the hearing on the writ was heard on May 4 and later televised by C-Span.

The Navy-Marine Corps Court of Criminal Appeals held that under *Goldsmith* they did not have jurisdiction⁵⁹ to grant relief to a defendant charged with espionage who claimed that the government was interfering with his attorney-client relationship by requiring that a security officer be present during all communications. We implicitly reversed the Court of Criminal Appeals by staying the Article 32 hearing and on May 8 ordering the following:

56. 38 M.J. 249 (C.M.A. 1993).

57. 526 U.S. 529 (1999).

58. No. 00-8007/NA, 2000 CAAF LEXIS 472 (C.A.A.F. May 8, 2000).

59. *King v. Mobley*, No. 200000329 (N.M. Ct. Crim. App. March 13, 2000) (“While this Court may issue writs . . . our authority to issue them must be ‘in aid of’ our statutory jurisdiction. . . . We have concluded that to act at this point in this case would not be ‘in aid of’ our jurisdiction.”).

ORDERED:

That the stay of proceedings issued by this Court be continued, to be lifted upon a showing that:

- (1) Defense counsel have been granted clearances and the ISO monitoring requirements have been rescinded; or
- (2) The Government demonstrates that defense counsel have not promptly provided all information necessary to initiate processing for the required security clearances; or
- (3) Lifting the stay is warranted for other good cause shown.⁶⁰

Implicit in our order was that it was “necessary” or “appropriate” to grant relief. The defendant had exhausted his remedies and the exercise of jurisdiction was consistent with judicial economy as in *Murray v. Halde-man*.⁶¹

I believe that the issue of the application of *Goldsmith* will be with us for some time as we re-examine the question of jurisdiction. While the majority of our court may have stretched a bit beyond our jurisdiction in *Goldsmith*, we are now seeing a reaction in some quarters that seems to be going too far the other way.

I submit to you once again that by analyzing and applying the rules regarding jurisdiction—rather than relying on personal preference—we will assure that all of us will drive in our proper lanes and maintain our role as jurists. Let me say once again that the basic premise or purpose of a criminal trial is truth-finding. We of course seek the truth within a framework of rights and rules that apply to those rights. Those rules have their foundation in the Constitution, in statutes, in the rules of procedure, evidence, and ethics, in regulations and directives, and in federal common law.

This, then, is the theme that we can all use as we apply a conceptual analysis to whatever issue may be before us. Recognizing the hierarchy of sources of rights—and focusing on the relationship among those sources—gives us the basic foundation from which to develop a conceptual analysis of a legal issue. And if we apply a common foundation both as practitioners and judges, then hopefully our approaches and decisions will be internally consistent, rational, and coherent. That, of course, ensures greater stability and predictability for all who work within or are subject to the mil-

60. No. 00-8007/NA, 2000 CAAF LEXIS 472 (C.A.A.F. May 8, 2000).

61. 16 M.J. 74 (C.M.A. 1983).

itary justice system. And in the final analysis, that ensures fairness and justice for all members of the armed forces.

In closing, I would be remiss if I did not mention that we are in the midst of the Fiftieth Anniversary celebration of the UCMJ. C-Span televised our ceremony celebrating the Fiftieth Anniversary of President Truman signing into law the Uniform Code of Military Justice. We were especially honored to have as our special guest, the Honorable Strom Thurman, the distinguished Senior Senator from the great state of South Carolina and President Pro Tempore of the Senate. We also were honored to read a message from the President that was signed on May 5th and commemorated the Fiftieth Anniversary of the Uniform Code of Military Justice. We all know that on 5 May 1950, President Truman signed Public Law Number 81-506, which is the Uniform Code of Military Justice. With that signing, the modern military justice system was born.

Military justice in the United States—while firmly rooted in our Constitution—can trace its lineage to the adoption of the Articles of War by the Continental Congress in 1775. It can be said that the first national courts for our soon-to-be created new nation were those courts-martial conducted by the Continental Army. The Articles of War—and the courts-martial for which they provided—withstood six wars and other tests of time for nearly two centuries. However, our experiences during World War II demonstrated the need to modernize and revamp our system of military justice. That is what the Uniform Code of Military Justice did and why we celebrate its passage.

The 1950 Uniform Code did many important things. Most notably, it ensured the protection of individual rights to the men and women who serve in our armed forces. These include:

- the right to counsel;
- the privilege against self-incrimination;
- the right to a speedy trial;
- the right to compulsory process;
- and protection against double jeopardy.

Of equal importance, the UCMJ also created an independent civilian court—then called the Court of Military Appeals—to oversee the military justice system.

For the past fifty years the UCMJ has served as the backbone of our military justice system. Like the Constitution in which it is grounded, the UCMJ has also been a living document. Many of you have not only seen change but have been instrumental in bringing about many of the changes that have improved the UCMJ during the past fifty years. I personally applaud each of your efforts. For it is our working together as a team that ensures that our men and women in uniform do not forfeit their guarantees as American citizens when they enter the armed forces of our nation.

The UCMJ stands as a hallmark of fairness—a constant reminder that we are a nation of laws, not of men. It is also a shining example of democracy in action to the rest of our world. I thank all of you who have helped make the UCMJ the bedrock on which every service member can rely to say that ours is not only a system of discipline—but also a system that is fairly disciplined.

I am sure most of you saw the issue of *Time* magazine last July that named “The American GI” as the most influential person of the twentieth century. In his introduction to that article, General Colin Powell said:

The GI carried the value system of the American people. GIs were the surest guarantee of America’s commitment. For more than 200 years they answered the call to fight the nation’s battles. They never went forth as mercenaries on the road to conquest. They went forth as reluctant warriors, as citizen soldiers. They were as gentle in victory as they were vicious in battle.⁶²

In this century hundreds of thousands of GIs died to bring to the beginning of the Twenty-first Century the victory of democracy as the ascendant political system on the face of the earth. The GIs were willing to travel far away and give their lives, if necessary, to secure the rights and freedoms of others. Only a nation such as ours, based on a firm moral foundation, could make such a request of its citizens. And the GI wanted nothing more than to get the job done and then return home safely.⁶³

62. Colin Powell, *The American G.I.*, TIME, June 14, 1999, at 72.

63. *Id.* at 73.

I assure you that as we begin the twenty-first century our court will guarantee that the American GI will continue to have a system of justice that not only is fair, but also one they believe to be fair.

STALKING AND THE MILITARY:

A PROPOSAL TO ADD AN ANTI-STALKING PROVISION
TO ARTICLE 134, UNIFORM CODE OF MILITARY
JUSTICEMAJOR JOANNE P.T. ELDRIDGE¹

[T]here is an [] epidemic that is spreading across this country, and it is called stalking. It may come as a shock to my colleagues that today the leading cause of injury among American women is being beaten by a man. And nationally an estimated 4 million men kill or violently attack the women they live with or date.²

—Senator William Cohen, 1992

This is Fort Campbell, home of the Army's elite air assault division. In just the past two years, three soldiers stationed here have been charged with killing their wives or girlfriends. One of the victims was Ronnie Spence, murdered by her ex-fiance, Sergeant Bill Coffin, in front of their baby daughter in their trailer home near the Army post . . . Domestic violence cases involving Fort Campbell soldiers routinely show up in [Kentucky Chief

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2. 138 CONG. REC. S13469-02 (daily ed. Sept. 15, 1992) (statement of Sen. Cohen calling for development of model anti-stalking legislation) (cited in Cassandra Ward, *Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior*, 12 LAW & INEQ. J. 613 (1994)).

*District] Judge MacDonald's courtroom, and he says Army commanders routinely ignore his court orders that are supposed to protect abused spouses. In the case of Ronnie Spence, the judge had issued this emergency protective order requiring Sergeant Coffin to stay at least a mile away from Spence at all times. But Coffin violated that order the day he drove off the Army post and killed her.*³

—CBS correspondent Bill Bradley, 1999

I. Introduction

Stalking is harassing or threatening behavior directed by one person toward another. A stalker will frequently follow the targeted person and direct repeated and unwanted communications, such as letters and telephone calls, to the targeted person or that person's family.⁴ These behaviors may escalate to threats against the person or the person's family, and they may be precursors to violence that will culminate in assault or murder.⁵ Stalking is an epidemic that affects hundreds of thousands of ordinary people every year.⁶ Annually, stalkers victimize more than one million women.⁷ More than ten million American women and men report that someone has stalked them at some point during their lifetime.⁸

To combat criminal stalking, all fifty states and the District of Columbia passed anti-stalking statutes⁹ between 1990 and 1994. Congress enacted a law to protect victims of interstate stalking in 1996.¹⁰ The mili-

3. *60 Minutes: The War at Home* (CBS television broadcast, Jan. 17, 1999) [hereinafter *60 Minutes*] (transcript on file with author).

4. DEP'T OF JUSTICE, OFFICE OF JUSTICE POLICY, VIOLENCE AGAINST WOMEN GRANTS OFFICE, STALKING AND DOMESTIC VIOLENCE: THE THIRD ANNUAL REPORT TO CONGRESS UNDER THE VIOLENCE AGAINST WOMEN ACT, ch. 1 (1998), available at <<http://www.ojp.usdoj.gov/vawo/grants/stalk98>> [hereinafter STALKING AND DOMESTIC VIOLENCE].

5. *Id.*

6. GAVIN DE BECKER, *THE GIFT OF FEAR* 25 (1997).

7. Women are three times more likely to be stalked than raped. STALKING AND DOMESTIC VIOLENCE, *supra* note 4. Stalking is also closely linked to domestic violence. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL INSTITUTE OF JUSTICE, DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION: ANNUAL REPORT TO CONGRESS, MARCH 1996, ch. 1, available at <<http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/>> [hereinafter ANTI-STALKING LEGISLATION].

8. STALKING AND DOMESTIC VIOLENCE, *supra* note 4.

9. *Id.*

10. 18 U.S.C. § 2261A (2000).

tary, though not immune from the societal issues of stalking and domestic violence, currently has no specific provision in the Uniform Code of Military Justice¹¹ (UCMJ) that makes stalking a crime.

This article reviews the increasing prevalence of stalking as a crime in society and addresses the unique nature of stalking offenses. It examines the enactment of anti-stalking legislation by the states and the federal government. The article discusses stalking within the military, including recent cases and charging practices, and notes the need for a military anti-stalking provision. This article recommends an amendment to the *Manual for Courts-Martial*¹² and proposes a specification for an anti-stalking provision under Article 134, UCMJ.

II. Stalking in Society

A. Nature of Stalking Offenses

Stalking is an issue of current societal concern, from the halls of Congress¹³ to newspapers¹⁴ and prime time television.¹⁵ One psychiatrist with experience as a stalking victim describes stalking as social terrorism.¹⁶ “Stalking generally refers to harassing or threatening behavior that an individual engages in repeatedly, such as following a person, appearing at a person’s home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person’s property.”¹⁷ These actions may, but do not necessarily, include threats of injury or other harm and may, but not necessarily, signal future violence.¹⁸ Although not every stalker overtly threatens the victim, a stalker’s course of conduct—by its

11. See 10 U.S.C. §§ 801-964 (2000).

12. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

13. Stalking Prevention and Victim Protection Act of 2000, S. 2011, 106th Cong. (2000) (proposing amendment of Title 18, United States Code, to expand the prohibition on stalking); Federal Jennifer Act, H.R. 3270, 106th Cong. (1999) (proposing enhancement of penalties for stalking a minor).

14. “Theresa,” *My So-Called Stalker: Negotiations with Fear, Obsession, and the D.C. Police*, WASH. CITY PAPER, Oct. 8, 1999, at 22; Liza Mundy, *A Story for the Silent*, WASH. POST, Dec. 5, 1999 (Magazine), at 6.

15. *Larry King Live* (CNN television broadcast, Jan. 5, 2000); *Investigative Reports, Love Chronicles* (A&E television broadcast, Jan. 22, 2000).

16. DR. DOREEN ORION, I KNOW YOU REALLY LOVE ME: A PSYCHIATRIST’S ACCOUNT OF STALKING AND OBSESSIVE LOVE 29-30 (1997).

17. STALKING AND DOMESTIC VIOLENCE, *supra* note 4.

18. *Id.*

very repetition—causes the victim to feel fear. According to the Department of Justice’s 1996 Report to Congress, stalking behavior is characterized by the repetition of certain actions accompanied by the intent to cause fear:

Stalking is a distinctive form of criminal activity composed of a series of actions (rather than a single act) that taken individually might constitute legal behavior. For example, sending flowers, writing love notes, and waiting for someone outside her place of work are actions that, on their own, are not criminal. When these actions are coupled with an intent to instill fear or injury, however, they may constitute a pattern of behavior that is illegal.¹⁹

Typically, a stalker’s behavior escalates from merely annoying to seriously threatening. Over time, a stalker’s actions can become “obsessive, dangerous, violent, and potentially fatal.”²⁰

1. *Types of Stalking*

Stalking may occur between people who know each well or people who do not know each other at all: “The motivations for stalking cover a wide range of desires for contact and control, obsession, jealousy, and anger—and stem from the real or imagined relationship between the victim and the stalker.”²¹ Based on the relationship with the victim, stalkers generally fall within one of three categories: intimates or former intimates, acquaintances, or strangers.²² Because research in this area is still in its infancy, very little information is available to predict who will become a stalker, particularly in acquaintance or stranger stalking cases.²³

2. *National Stalking Survey*

The National Institute of Justice and the Centers for Disease Control and Prevention sponsored the first national study on stalking in the United States from November 1995 to May 1996.²⁴ Researchers obtained data for

19. ANTI-STALKING LEGISLATION, *supra* note 7, intro.

20. *Id.* ch. 2.

21. *Id.*

22. *Id.*; STALKING AND DOMESTIC VIOLENCE, *supra* note 4, intro.

23. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, intro.

24. PATRICIA TJADEN & NANCY THOENNES, STALKING IN AMERICA: FINDINGS FROM THE

the study, known as the National Violence Against Women (NVAW) Survey, from a nationally representative telephone survey of 8000 American women and 8000 American men.²⁵ The NVAW Survey consisted of detailed questions about the survey participants' experiences with violence, including stalking.²⁶ The survey "define[d] stalking as 'a course of conduct directed at a specific person that involves repeated visual or physical proximity, nonconsensual communication, or verbal, written, or implied threats, or a combination thereof, that would cause a reasonable person fear,' with *repeated* meaning on two or more occasions."²⁷

The NVAW Survey found that more than ten million Americans—over eight million women and two million men—had been stalked at some time in their lives.²⁸ Women are the primary victims of stalking, and men are the primary perpetrators.²⁹ The NVAW Survey confirmed that most stalking victims know their assailants.³⁰ Young adults are the population

24. (continued) NATIONAL VIOLENCE AGAINST WOMEN SURVEY 15 (1998). "Prior to this study, empirical data on the prevalence and characteristics of stalking in the general population were virtually nonexistent." *Id.* at 13. The survey addressed such questions as, "How much stalking is there in the United States? Who stalks whom? How often do stalkers overtly threaten their victims? How often is stalking reported to the police? What are the psychological and social consequences of stalking?" *Id.* at 1. The NVAW Survey made seven policy recommendations: (1) Treat stalking as the significant social problem that it is; (2) Drop credible threat requirements from anti-stalking statutes; (3) Focus future research on intimate and acquaintance stalking, not celebrity stalking; (4) Train criminal justice practitioners and personnel on the safety needs of stalking victims; (5) Study the efficacy of formal law enforcement measures, such as restraining orders, and informal interventions, such as police warnings; (6) Train mental health professionals on the appropriate treatment of stalking victims; and (7) Include address confidentiality programs as part of anti-stalking and victim protection strategies. *Id.* at 13-14.

25. *Id.* at 1, 15-16 (Survey Methodology and Demographic Description of the Sample), 17 (Survey Screening Questions).

26. *Id.* at 1, 17.

27. *Id.* at 2 (emphasis in original).

28. *Id.* at 3. Put differently, one out of twelve American women (eight percent) and one in forty-five American men (two percent) have been stalked during their lives, based on 1995 U.S. Census estimates of women and men aged eighteen and older. *Id.* The NVAW Survey estimates of stalking prevalence are far higher than previous "guessestimates" made by mental health professionals. *Id.* at 4. The rate of stalking prevalence increases if stalking is more broadly defined as requiring only that victims felt a little or somewhat frightened of their assailants, as compared with the NVAW Survey's definition of stalking which required that victims felt very frightened or feared bodily harm. *Id.*

29. Seventy-eight percent of stalking victims are women, and ninety-four percent of their stalkers are men. *Id.* at 5.

30. Fifty-nine percent of female victims are stalked by an intimate or former intimate partner, as compared with thirty percent of male victims, who are more often stalked by acquaintances or strangers. *Id.* at 5-6.

most at risk of becoming targets for stalkers.³¹ The average stalking case lasts for 1.8 years, and cases involving intimates or former intimates last an average of 2.2 years.³²

Stalkers engage in a course of conduct which, considered in context, causes reasonable fear in their victims.³³ Despite the high level of fear described by the victims, however, less than half of the stalkers overtly threatened the victims.³⁴ The NVAW Survey found that only around half of all stalking victims reported the stalking to the police.³⁵ Female victims were more likely than were male victims to obtain protective orders against their stalkers.³⁶ Most victims who obtained protective orders reported that their stalkers had violated the orders.³⁷ Only thirteen percent of women and nine percent of men reported criminal prosecutions of their stalkers; charges included stalking, making threats, harassment, vandalism, trespassing, breaking and entering, disorderly conduct, and assault.³⁸ Criminal convictions resulted for about half of those prosecuted for stalking or related crimes.³⁹

Stalking has strong negative psychological effects on its victims. Concerned about their personal safety, stalking victims reported seeking counseling, missing work or not going back to work at all, and taking a variety of extra precautions—excluding police reports or protective orders—to protect themselves.⁴⁰ Such self-help measures included obtaining a gun, changing addresses or moving out of town, hiring a private investigator, consulting an attorney, varying driving routes, moving to a shelter, refusing to leave home, getting public records sealed, requesting assistance from family and friends, and avoiding the stalker.⁴¹ Commenting on the reaction of the criminal justice system to the impact of stalking

31. Fifty-two percent of victims are eighteen to twenty-nine years old, and twenty-two percent are thirty to thirty-nine years old. The average victim's age was twenty-eight at the time the stalking started. *Id.*

32. *Id.* at 12.

33. *Id.* at 7-8; see DE BECKER, *supra* note 6, at 126 (emphasizing the importance of considering the context of communications, not simply their content).

34. TJADEN & THOENNES, *supra* note 24, at 7-8.

35. *Id.* at 9.

36. *Id.* at 10.

37. *Id.* at 10-11.

38. *Id.* at 10.

39. *Id.*

40. *Id.* at 11.

41. *Id.*

on the victims, one domestic violence expert noted, “Everyone minimizes [the fact] that this kind of behavior freaks people out.”⁴²

3. *Relationship Between Stalking and Domestic Violence*

Results of the NVAW Survey demonstrate a compelling link between stalking and domestic violence.⁴³ Estimates suggest that battered women account for as many as half of female murder victims, and experts believe that stalking may precede a significant number of such murders.⁴⁴ Eighty-one percent of women stalked by an intimate or former intimate partner were also assaulted by that partner, and thirty-one percent were also sexually abused by that partner.⁴⁵ Male stalkers are much more likely to physically or sexually assault their intimate partners—in short, to be batterers—than men in the general population.⁴⁶

B. State Responses to Stalking

1. *California’s Anti-Stalking Law*

Beginning with California in 1990, every state enacted anti-stalking legislation.⁴⁷ The 1989 murder of young actress Rebecca Schaeffer by a male stalker drew attention to the crime of stalking in California.⁴⁸ Although typically cited as the impetus for the California law, the Schaeffer murder was not the sole basis for the statute. The domestic violence murders of four women by the men against whom they had protective orders are at the heart of the nation’s first anti-stalking law. California Municipal Court Judge John M. Watson initiated the stalking legislation in response to the failure of existing laws to protect women from their domestic abusers, despite restraining orders and pending misdemeanor charges.⁴⁹

42. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 3 (statement of Robert C. Gallup, executive director of AMEND, a Denver program for domestic violence offenders).

43. *Id.* at 8.

44. *Id.*

45. *Id.*

46. *Id.*

47. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2 and app. A (Anti-Stalking Legislation Update for States and Selected Territories, March 1998).

48. ORION, *supra* note 16, at 29-30.

49. NANCY K.D. LEMON, DOMESTIC VIOLENCE AND STALKING: A COMMENT ON THE MODEL ANTI-STALKING CODE PROPOSED BY THE NATIONAL INSTITUTE OF JUSTICE (1994), *avail-*

After several amendments, California's stalking statute currently provides as follows:

Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.⁵⁰

The statute addresses two distinct forms of criminal conduct: (1) willful, malicious and repeated following, and (2) harassment.⁵¹ The California law provides for increased punishments for violations of temporary restraining orders, or other court orders, and subsequent stalking convictions.⁵² The statute specifically defines "harasses," "course of conduct," "credible threat," "electronic communication device," and "immediate family."⁵³ California's appellate courts have upheld the statute against constitutional challenges.⁵⁴

49. (continued) *able at* <<http://www.vaw.umn.edu/BWJP/stalking.htm>> [hereinafter COMMENT ON THE MODEL ANTI-STALKING CODE].

50. CAL. PENAL CODE § 646.9(a) (Deering 1999).

51. *People v. McCray*, 58 Cal. App. 4th 159, 170 (Cal. Ct. App. 1997) (concluding that "the two types of conduct upon which a stalking conviction may be based are willful, malicious and repeated following, on the one hand, and harassment (according to the statutory definition) on the other"; clarifying *People v. Heilman*, 25 Cal. App. 4th 391, 399 (Cal. Ct. App. 1994)).

52. CAL. PENAL CODE § 646.9(b), (c) (setting forth increased punishment of imprisonment for two to four years).

53. *Id.* § 646.9(e), (f), (g), (h), (l).

54. *See People v. Borrelli*, 77 Cal. App. 4th 703 (Cal. Ct. App. 2000) (holding that stalking statute did not infringe on free speech rights and that the term "safety" was not unconstitutionally vague); *People v. Ewing*, 76 Cal. App. 4th 199 (Cal. Ct. App. 1999) (reversing conviction due to insufficient evidence that the victim suffered "substantial emotional distress," but upholding constitutionality of stalking statute); *McCray*, 58 Cal. App. 4th at 159 (rejecting claim that harassment must be repeated and holding that a single series of separate acts constituting harassment may properly form the basis for a stalking conviction); *People v. Falck*, 52 Cal. App. 4th 287 (Cal. Ct. App. 1997) (rejecting claims that term "safety" is unconstitutionally vague and that "credible threat" is unconstitutionally broad because it does not require that defendant actually intended to carry out the threat).

2. Variation in State Stalking Statutes

Stalking definitions vary widely across state lines: “Though most States define stalking as the willful, malicious, and repeated following and harassing of another person, some States include in their definition such activities as lying-in-wait, surveillance, nonconsensual communication, telephone harassment, and vandalism.”⁵⁵ Most states require a course of conduct, and half require at least two occurrences.⁵⁶ Threat requirements also vary widely, with most states requiring a credible threat of violence against the victim or the victim’s immediate family and other jurisdictions requiring only that the stalker’s course of conduct amounts to an implied threat.⁵⁷ The states also differ in their classifications of stalking by punishment and severity of offense. Although some states treat stalking as a felony-only offense,⁵⁸ the majority of states classify it as a misdemeanor.⁵⁹

55. TJADEN & THOENNES, *supra* note 24, at 1-2.

56. Twenty-five states require two incidents to demonstrate repeated behavior or a course of conduct. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2 and app. A. These states are Arizona: ARIZ. REV. STAT. ANN. § 13-2921 (West 2000); Arkansas: ARK. CODE ANN. § 5-71-229 (Michie 1999); Colorado: COLO. REV. STAT. ANN. § 18-9-111 (West 1999); Hawaii: HAW. REV. STAT. ANN. § 711-1106.5 (Michie 1999); Illinois: 720 ILL. COMP. STAT. ANN. § 5/12-7.3 (West 1999); Iowa: IOWA CODE ANN. § 708.11 (West 1999); Kentucky: KY. REV. STAT. ANN. § 508.130 (Michie 1998); Maine: ME. REV. STAT. ANN. tit. 17-A § 210-A (West 1998); Michigan: MICH. COMP. LAWS ANN. § 600.2950 (West 1999); Minnesota: MINN. STAT. ANN. § 609.749 (West 1999); New Hampshire: N.H. REV. STAT. ANN. § 633:3-a (1999); New Jersey: N.J. STAT. ANN. § 2C:12-10 (West 1999); New Mexico: N.M. STAT. ANN. § 30-3A-3 (Michie 2000); North Carolina: N.C. GEN. STAT. § 14-277.3 (1999); North Dakota: N.D. CENT. CODE § 12.1-17-07.1 (2000); Ohio: OHIO REV. CODE ANN. § 2903.211-.215 (Anderson 1999); Oklahoma: OKLA. STAT. ANN. tit. 21, § 1173 (West 1999); Pennsylvania: 18 PA. CONS. STAT. ANN. § 2709 (West 1999); South Carolina: S.C. CODE ANN. § 16-3-1700 (Law Co-op. 1998); Tennessee: TENN. CODE ANN. § 39-17-315 (1999); Texas: TEX. PENAL CODE ANN. § 42.072 (West 1999); Utah: UTAH CODE ANN. § 76-5-106.5 (1999); Vermont: VT. STAT. ANN. tit. 13, §§ 1061-1063 (2000); Virginia: VA. CODE ANN. § 18.2-60.3 (Michie 1999); and Wisconsin: WIS. STAT. ANN. § 940.32 (West 1999).

57. Only twelve states define “threat” to include implied as well as actual threats. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2 and app. A. These states are Alabama: ALA. CODE § 13A-6-90 (1999); Arizona: ARIZ. REV. STAT. ANN. § 13-2923 (West 2000); California: CAL. PENAL CODE § 646.9 (Deering 1999); Delaware: DEL. CODE ANN. tit. 11, § 1312A (1999); Georgia: GA. CODE ANN. § 16-5-90 (1999); Indiana: IND. CODE § 35-45-10-1 (1999); Iowa: IOWA CODE ANN. § 708.11 (West 1999); Kentucky: KY. REV. STAT. ANN. § 508.140 (Michie 1998); Maine: ME. REV. STAT. ANN. tit. 17-A § 210-A (West 1998); New Hampshire: N.H. REV. STAT. ANN. § 633:3-a (1999); South Dakota: S.D. CODIFIED LAWS § 22-19A-1 (Michie 2000); and Vermont: VT. STAT. ANN. tit. 13, §§ 1061 (2000).

3. Effect of State Anti-Stalking Laws

Before the passage of state stalking laws, police and prosecutors in the criminal justice system had to address stalking-type offenses using other criminal law prohibitions, such as threats, trespass, harassment, and civil law injunctions.⁶⁰ Use of these related provisions was an inadequate response to stalking offenses. Not only were punishments for relatively minor criminal offenses light, convictions for more serious offenses were difficult to obtain due to the high standard of proof required to show intent.⁶¹ Civil injunctions proved to be too hard to secure. Most impor-

58. States that treat stalking as a felony-only offense are Alabama: ALA. CODE § 13A-6-90 (1999); Arizona: ARIZ. REV. STAT. ANN. § 13-2923 (West 2000); Arkansas: ARK. CODE ANN. § 5-71-229 (Michie 1999); Colorado: COLO. REV. STAT. ANN. § 18-9-111 (West 1999); Delaware: DEL. CODE ANN. tit. 11, § 1312A (1999); Florida: FLA. STAT. ANN. § 748.048 (West 1999); Illinois: 720 ILL. COMP. STAT. ANN. 5/12-7.4 (West 1999); Kansas: KAN. STAT. ANN. § 21-3438 (1999); Maryland: MD. CODE ANN., Stalking § 124 (1999); Massachusetts: MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1999); Michigan: MICH. COMP. LAWS ANN. § 600.2950 (West 1999); Minnesota: MINN. STAT. ANN. § 609.749 (West 1999); Missouri: MO. ANN. STAT. § 565.225 (West 1999); Nevada: NEV. REV. STAT. ANN. § 200.575 (Michie 2000); and Vermont: VT. STAT. ANN. tit. 13, §§ 1062-1063 (2000).

59. States that classify stalking as a misdemeanor, or as both a misdemeanor and a felony depending on the circumstances, are Alaska: ALASKA STAT. § 11.41.270 (Michie 1999); California: CAL. PENAL CODE § 646.9 (Deering 1999); Connecticut: CONN. GEN. STAT. ANN. § 53a-181-d (West 1999); District of Columbia: D.C. CODE ANN. § 22-504 (1999); Georgia: GA. CODE ANN. § 16-5-90 (1999); Hawaii: HAW. REV. STAT. ANN. § 711-1106.5 (Michie 1999); Idaho: IDAHO CODE § 18-7905 (1999); Indiana: IND. CODE § 35-45-10-5 (1999); Iowa: IOWA CODE ANN. § 708.11 (West 1999); Kentucky: KY. REV. STAT. ANN. § 508.150 (Michie 1998); Louisiana: LA. REV. STAT. ANN. § 14:40.2 (West 2000); Maine: ME. REV. STAT. ANN. tit. 17-A, § 210-A (West 1998); Mississippi: MISS. CODE ANN. § 97-3-107 (1999); Montana: MONT. CODE ANN. § 45-5-220 (1999); Nebraska: NEB. REV. STAT. ANN. §§ 28-311.04 (Michie 1999); New Hampshire: N.H. REV. STAT. ANN. § 633:3-a (1999); New Jersey: N.J. STAT. ANN. § 2C:12-10 (West 1999); New Mexico: N.M. STAT. ANN. § 30-3A-3.1, 4.0 (Michie 2000); New York: N.Y. PENAL LAW § 120.45 (McKinney 1999); North Carolina: N.C. GEN. STAT. § 14-277.3 (1999); North Dakota: N.D. CENT. CODE § 12.1-17-07.1 (2000); Ohio: OHIO REV. CODE ANN. § 2903.211-.215 (Anderson 1999); Oklahoma: OKLA. STAT. ANN. tit. 21, § 1173 (West 1999); Oregon: OR. REV. STAT. § 163.732 (1997); Pennsylvania: 18 PA. CONS. STAT. ANN. § 2709 (West 1999); Rhode Island: R.I. GEN. LAWS §§ 11-59-2 (1999); South Carolina: S.C. CODE ANN. § 16-3-1720 (Law Co-op. 1998); South Dakota: S.D. CODIFIED LAWS § 22-19A-1 (Michie 2000); Tennessee: TENN. CODE ANN. § 39-17-315 (1999); Texas: TEX. PENAL CODE ANN. § 42.072 (West 1999); Utah: UTAH CODE ANN. § 76-5-106.5 (1999); Virginia: VA. CODE ANN. § 18.2-60.3 (Michie 1999); Washington: WASH. REV. CODE ANN. § 9A.46.110 (West 1999); West Virginia: W. VA. CODE § 61-2-9a (2000); Wisconsin: WIS. STAT. ANN. § 940.32 (West 1999); and Wyoming: WYO. STAT. ANN. § 6-2-506 (Michie 2000).

60. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2.

61. *Id.*

tantly, police officers and prosecutors did not make stalking a high priority, often relegating it to the same status as unenforced laws against domestic violence.⁶²

The enactment of anti-stalking statutes altered this atmosphere in the criminal justice system in two significant ways. First, the passage of stalking laws reinforced that legislators treated stalking seriously and considered enforcement of such laws important. Second, stalking laws reflected a change by adding a test of reasonableness to show intent.⁶³ Enactment of an anti-stalking statute demonstrates a commitment to making the criminal justice system treat stalking offenses seriously, which is critically important.⁶⁴

C. Federal Responses to Stalking

1. *Development of the Model Anti-Stalking Code for the States*

In 1992, as many states rushed to pass anti-stalking laws, then-Senator William Cohen called for the National Institute of Justice to develop model legislation to assist the states in enacting constitutional measures to address criminal stalking.⁶⁵ Citing specific examples of victims who had been murdered by their stalkers, Senator Cohen noted, "Justice Brandeis identified the 'right to be left alone as the most comprehensive of rights and the right most valued by civilized men.'"⁶⁶ Senator Cohen called for model legislation that would protect the right to privacy without infringing on constitutional rights.⁶⁷ In 1993, the National Institute of Justice responded with the Project to Develop a Model Antistalking Code for States.⁶⁸ The Model Code urges lawmakers to treat stalking as a felony and establish appropriately serious penalties for effective prosecution and

62. *Id.*

63. *Id.*

64. LEMON, *supra* note 49.

65. 138 CONG. REC. S13469-02 (daily ed. Sept. 15, 1992) *quoted in* Cassandra Ward, *Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior*, 12 LAW & INEQ. J. 613 (1994).

66. *Id.*

67. *Id.*

68. DEP'T OF JUSTICE, NAT'L INSTITUTE OF JUSTICE, NAT'L CRIMINAL JUSTICE ASS'N, PROJECT TO DEVELOP A MODEL ANTISTALKING CODE FOR STATES (1993), *available at* <<http://www.ojp.usdoj.gov/ocpa/94Guides/DomViol/appendb.htm>> [hereinafter MODEL CODE].

sentencing of stalkers.⁶⁹ Section 1 of the Model Code contains definitions of key terms,⁷⁰ and Section 2 contains the substantive elements.⁷¹

The Model Code differs from state statutes in several ways. For instance, the Model Code does not provide an illustrative list of behaviors that may constitute stalking. Instead, the Code focuses on a broader prohibition against engaging in a course of conduct that would cause fear in a reasonable person.⁷² Unlike most state statutes, the Model Code does not require a “credible threat” but seeks to capture that conduct which would cause a reasonable person fear if taken in context, including threats implied by conduct.⁷³ Only twelve states use a definition that includes implied threats.⁷⁴

69. *Id.*

70. *Id. sec. 1.*

Section 1. For purposes of this code:

- (a) ‘Course of conduct’ means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;
- (b) ‘Repeatedly’ means on two or more occasions; and
- (c) ‘Immediate family’ means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

71. *Id. sec. 2.*

Section 2. Any person who:

- (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family;
- (b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and
- (c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family; is guilty of stalking.

72. *Id.*

73. *Id.*

74. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2; *see* statutes cited *supra* note 57.

a. Intent requirement

Under the Model Code, proof that a stalker engaged in purposeful conduct with knowledge that such conduct would cause a reasonable person fear suffices as proof of intent. Thus, a defendant whose actual or stated intent is to establish a relationship with his victim need not specifically intend to cause fear, as long as he knows or reasonably should know that his behavior will cause fear.⁷⁵ Protective orders may serve as notice that the conduct is not welcome and that it is causing the victim fear.⁷⁶ The degree of fear suffered by the victim is a central element of stalking, and the level required by the Model Code is high: fear of bodily injury or death.⁷⁷ This requirement of a high degree of fear is related to the Model Code's recommendation that stalking be treated as a felony offense.⁷⁸

b. Felony Classification

The Model Code encourages the states to treat stalking seriously, suggesting that felony classification makes clear to the public that stalking is a unique offense.⁷⁹ Due to the nature of stalking as a series of increasingly serious activities, the Code also suggests "establish[ment of] a continuum of charges that could be used by law enforcement officials to intervene at various stages."⁸⁰ Most states classify stalking as a misdemeanor, although some states do treat stalking as a felony-only crime.⁸¹

2. The Interstate Stalking Punishment and Prevention Act of 1996

Three years after the development of the Model Code, Congress created a new federal stalking offense when it passed the Interstate Stalking Punishment and Prevention Act of 1996. This Act provides as follows:

75. MODEL CODE, *supra* note 68.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, ch. 2; *see* statutes cited *supra* notes 58-59.

Whoever travels across a State line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury (as defined in section 1365(g)(3) of this title) to, that person or a member of that person's immediate family (as defined in section 115 of this title) shall be punished as provided in section 2261 of this title.⁸²

Representative Royce, who as a state legislator was responsible for introducing California's anti-stalking law in 1990, introduced the bill in the House.⁸³ Punishments include imprisonment from five years to life, depending on the circumstances.⁸⁴

III. Stalking in the Military

The military community is not immune from the societal problems of stalking and domestic violence: "The military is said to be a mirror of the society from which it draws its members, and as such it is not immune from domestic violence."⁸⁵ There is a strong link between incidents of stalking and domestic violence, and the military services have come under increasingly close scrutiny for their handling of domestic violence cases.⁸⁶

Stalking offenses present charging challenges for military prosecutors.⁸⁷ Anecdotal evidence suggests that stalking offenses may be resolved

82. 18 U.S.C. § 2261A (2000).

83. 142 CONG. REC. H4457, 4458 (daily ed. May 7, 1996) (statement of Rep. Royce).

84. 18 U.S.C. § 2261(b).

85. Peter A. Dutton, *Spousal Battering as Aggravated Assault: A Proposal to Modify the UCMJ*, 43 NAVAL L. REV. 111, 114 (1996).

86. See 60 Minutes, *supra* note 3. The National Defense Authorization Act for Fiscal Year 2000, 106 Pub. L. No. 65, 113 Stat. 512 (1999), calls upon the Secretary of Defense to establish a Military-Civilian Task Force on Domestic Violence to create a plan for the Department of Defense (DOD) to address domestic violence issues more effectively. Included are issues such as victim safety, training for military commanders, offender accountability, and prevention of and responses to domestic violence at overseas locations. The task force, which has a three-year tenure, will have representatives from the Department of Justice and the Department of Health and Human Services as well as DOD. Interview with Lieutenant Colonel James Jackson, Chief, Army Community Service, in Alexandria, Va. (Jan. 28, 2000) [hereinafter Jackson Interview].

87. The Army's Trial Counsel Assistance Program (TCAP) has received inquiries from prosecutors in the field concerning stalking, including how to charge it and whether

through administrative rather than military justice channels,⁸⁸ although military trial and appellate courts have considered stalking issues. Despite the potentially serious effects of criminal stalking, however, military law enforcement organizations are not specifically tracking stalking offenses,⁸⁹ nor are military family advocacy groups reporting the incidence of stalking as it relates to domestic violence.⁹⁰

87. (continued) lawful no-contact orders to prevent stalking behavior are transferable to a soldier's next duty station. See TCAP Memo #89 (December 1993); TCAP Memo #117 (October 1997-January 1998) (on file with author).

88. Federal courts have considered stalking issues raised by members of the military in civil litigation. In *Fuller v. Secretary of Defense*, 30 F.3d 86 (8th Cir. 1994), the plaintiff brought a civil complaint seeking review of an administrative decision to separate him from the United States Marine Corps Reserves and correction of his military records to delete all references to a stalking incident upon which his administrative separation was based. In *Butler v. Department of the Air Force*, Civil No. 94-2306, 1996 U.S. Dist. LEXIS 4062 (D.D.C. Apr. 1, 1996) (unpub.), the plaintiff brought an action under the Freedom of Information Act (FOIA) and the Privacy Act seeking access to records of the Air Force and the Air Force Office of Special Investigations (AFOSI) after the AFOSI initiated an investigation into the plaintiff's stalking conduct in connection with the murders of his fiancée and her daughter, crimes in which the plaintiff was the prime suspect. The plaintiff was later arrested for stalking, though at trial those charges were dismissed.

89. In the Army, the Criminal Investigation Command (CID) "is responsible for investigating those Army-related felonies (offenses punishable by death or confinement for more than one year) listed in Appendix B." DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION: CRIMINAL INVESTIGATION ACTIVITIES, ¶ 3-3 (30 Oct. 1990). Further, the CID is responsible for all felony investigations in which the Army is a party of interest. Such investigations routinely include felony crimes listed in the United States Code, foreign felony crimes, state felony crimes in areas of exclusive or concurrent federal jurisdiction, and felony crimes that might be assimilated under the UCMJ from state law. However, Appendix B does not list stalking—it is not a UCMJ offense. The Army Crime Records Center (CRC) serves as the repository for maintenance of permanent CID and selected military police files. *Id.* ¶ 5-1. Neither the CID nor the CRC tracks stalking offenses separate and apart from individual reports of investigation in which such offenses may appear. Therefore, although the CID may investigate felony stalking, records of the number of such cases are not available. Telephone Interview with Major Jamie Eaker, Deputy Staff Judge Advocate, U.S. Army Criminal Investigation Command (Nov. 4, 1999).

90. In the Army, the Family Advocacy Program (FAP) is intended "to prevent spouse and child abuse, to encourage the reporting of all instances of such abuse, to ensure the prompt assessment and investigation of all abuse cases, to protect victims of abuse, and to treat all family members affected by or involved in abuse." DEP'T OF ARMY, REG. 608-18, PERSONAL AFFAIRS: THE ARMY FAMILY ADVOCACY PROGRAM, ¶ 1-5 (1 Sept. 1995). While it might be possible to obtain a known report concerning a particular individual who engaged in stalking behavior, it is not possible to conduct a search or obtain statistics for soldiers whose family violence included stalking. Neither the FAP nor the Army Community & Family Support Center tracks or reports stalking offenses separately from individual records in which such offenses may appear. Jackson Interview, *supra* note 86.

A. Trial Courts

1. Survey of Military Judges

Based on a survey of military trial judges, stalking is appearing in courts-martial. In the fall of 1999, the author prepared five questions on stalking offenses that the Chief, Army Trial Judiciary, circulated to military judges of all of the services.⁹¹ Though not intended to be a comprehensive historical survey, the results represent a snapshot of stalking offenses in the military from the perspective of current military judges as of November 1999. Judges of every service except the Navy-Marine Corps reported stalking offenses. In the Army, Air Force, and Coast Guard, military judges reported stalking offenses at courts-martial, as both charged and uncharged misconduct.

2. Army

An Army judge reported a stalking offense charged as a violation of 18 U.S.C. § 2261A, the federal anti-stalking statute.⁹² Another Army judge reported an overseas stalking case charged as service discrediting conduct under the general article, Article 134, UCMJ.⁹³ Other Army

91. Although part of the Department of Transportation and not technically part of the armed forces, the Coast Guard trial judges were included in this survey because they practice under the UCMJ and *MCM*.

The survey questions were as follows:

- (1) Have you seen stalking offenses at courts-martial as either charged or uncharged misconduct?
- (2) How do stalking offenses most often come before the court (e.g., assimilated under the Assimilative Crimes Act using Article 134, charged as pure Article 134 violations, charged under Article 92, uncharged misconduct, victim testimony only)?
- (3) Have you ever seen the federal anti-stalking provision (18 U.S.C. § 2261A) used at a court-martial?
- (4) What problems of proof does the government encounter in prosecuting stalking offenses?
- (5) Do stalking charges generally survive motions and trial to conviction? Is there a difference in stalking conviction rates in cases before a judge alone versus a panel?

Survey of Military Trial Judges (Oct.-Nov. 1999) [hereinafter Judge Survey] (results on file with author).

92. *Id.*

judges reported stalking offenses at courts-martial charged as violations of lawful orders under Article 92, UCMJ, and as uncharged misconduct or actions otherwise in the background of charged misconduct.⁹⁴ The judges reported issues concerning jurisdiction, including the assimilation of state law at courts-martial.⁹⁵ The judges also mentioned issues relating to proof of intent, admissibility of uncharged misconduct, and victims who send “mixed” signals to their stalkers concerning the contact.⁹⁶

3. Air Force

An Air Force judge reported trying a stalking case in which the conduct was charged as a general disorder or neglect under Article 134, UCMJ, in addition to charges of failure to obey an order (Article 92, UCMJ), damage to personal property (Article 109, UCMJ), and forgery (Article 123, UCMJ).⁹⁷ The judge cited the preemption doctrine as a limitation on charging stalking behaviors under Article 134, UCMJ.⁹⁸ Many of the acts that could be charged as stalking are preempted by other punitive articles of the UCMJ and thus are properly subject to motions to dismiss.⁹⁹ The judge also reported other cases in which stalking was involved but charged as a violation of another punitive article, such as failure to obey a no-contact order, communicating a threat, or simple assault.¹⁰⁰

4. Coast Guard/Navy/Marine Corps

A Coast Guard judge reported a court-martial in which stalking was charged as a violation of Article 93, UCMJ, because the victim was a sub-

93. *Id.*

94. *Id.*

95. The Federal Assimilative Crimes Act (ACA) permits the assimilation of state criminal laws in federal prosecutions in areas under exclusive or concurrent federal jurisdiction, such as military installations. 18 U.S.C. § 13(a) (2000). The vehicle for charging assimilated offenses at courts-martial is through Article 134, UCMJ. MCM, *supra* note 12, pt. IV, ¶ 60c(4)(c)(ii). The ACA does not apply absent proof that the offenses occurred on a military installation, nor does it apply to military installations located overseas. *See* 18 U.S.C. § 13(a); *see also* Judge Survey, *supra* note 91.

96. Judge Survey, *supra* note 91.

97. *Id.*

98. *Id.*

99. “The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80-132.” MCM, *supra* note 12, pt. IV, ¶ 60c(5)(a).

100. Judge Survey, *supra* note 91.

ordinate of the accused, and another case in which stalking actions were introduced as uncharged misconduct.¹⁰¹ Navy and Marine Corps judges reported no stalking cases.¹⁰²

B. Appellate Courts

Between 1994 and 1999, appellate courts addressed stalking-type issues in three cases. Stalking or harassment offenses were charged as violations of state anti-stalking laws under Article 134, UCMJ, using the Assimilative Crimes Act; violations of Article 134, UCMJ, modeled on state anti-stalking or anti-harassment statutes; or violations of Article 92, UCMJ.

1. Court of Appeals for the Armed Forces

Although no stalking issues are currently pending before the Court of Appeals for the Armed Forces,¹⁰³ that court considered a stalking case in 1998. In *United States v. Sweeney*,¹⁰⁴ the court considered whether the military judge properly allowed evidence of appellant's threatening conduct toward his first wife into evidence in his court-martial for stalking his second wife. A general court-martial convicted appellant of stalking his second wife in violation of North Carolina's anti-stalking law,¹⁰⁵ as assimilated under 18 U.S.C. § 13, and the Air Force Court of Criminal

101. *Id.*

102. *Id.*

103. Telephone Interview with Ken Albert, Office of the Clerk of Court, Court of Appeals for the Armed Forces (Oct. 25, 1999).

104. 48 M.J. 117 (1998).

105. N.C. GEN. STAT. § 14-277.3 (1992), provides as follows:

(a) Offense. A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose: (1) with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury; (2) after reasonable warning or request to desist by or on behalf of the other person; and (3) the acts constitute a pattern of conduct over a period of time evidencing a continuity of purpose.

Sweeney, 48 M.J. at 119 n.2.

106. *United States v. Sweeney*, No. ACM 32026 (A.F. Ct. Crim. App. Jan. 17, 1997) (unpub.). Before the Air Force Court of Criminal Appeals, appellant challenged his stalking conviction on grounds that the assimilated North Carolina statute was void for vague-

Appeals affirmed.¹⁰⁶ At issue was appellant's intent to cause emotional distress to his second wife when he continued to contact her and follow her, over her objections, after their separation.¹⁰⁷

Writing for the majority, Judge Sullivan concluded that the uncharged misconduct directed against the appellant's former spouse was sufficiently similar to the charged acts (wrongful entry into the spouse's home, damage to her car, and threats against her home and person) against appellant's then-current spouse to be relevant on the issue of appellant's intent. "Such evidence was 'specially' relevant in determining appellant's later intent because it showed his awareness that such conduct directed towards an estranged spouse could reasonably be viewed as a 'true threat.'"¹⁰⁸

2. Courts of Criminal Appeals

In 1999, the Air Force Court of Criminal Appeals upheld a conviction based on Article 134 for stalking-type misconduct in *United States v. Rowe*.¹⁰⁹ In that case, a general court-martial convicted appellant of failure to obey two lawful orders, damage to personal property, breach of the peace, three assaults, two threats, and "harassment," all resulting from his breakup with Airman First Class (A1C) N.M. Over a two-month period, appellant "assaulted, threatened, insulted, repeatedly telephoned her, blocked her automobile in a parking lot in order to force her to read a love letter, broke a window in her residence, refused to leave her residence when requested, and disobeyed orders to cease contact with her."¹¹⁰ Mod-

106. (continued) ness and that the evidence supporting his conviction was factually and legally insufficient. The Air Force court found that the North Carolina statute was neither vague nor arbitrary. On the gravamen of a stalking offense, the Air Force court noted that "the offense of stalking requires a pattern of conduct which causes the victim emotional distress because she fears what is not overtly threatened: death or bodily injury. A stalker deliberately creates fear without words or physically menacing behavior." *Id.* slip op. at 10. The court concluded that appellant's conduct was "just the sort of pattern of continuous harassment which constitutes stalking." *Id.* slip op. at 10-11.

107. *Sweeney*, 48 M.J. at 119.

108. *Id.* at 121 (citations omitted).

109. ACM 32852 (A.F. Ct. Crim. App. Apr. 7, 1999) (unpub.), *pet. denied*, 52 M.J. 417 (1999).

110. *Rowe*, slip op. at 4-5.

eled on a Georgia stalking statute, the harassment offense¹¹¹ was charged under Article 134, UCMJ.

On appeal, appellant challenged the harassment conviction on three grounds: the conduct at issue in the specification was not unlawful and could not be rendered so by charging it as a violation of Article 134; the specification was void for vagueness because it failed to put him on notice of the meaning of “harass;” and that, in light of his previous relationship with A1C N.M., he could not have known that his conduct toward her was criminal.¹¹² Noting at the outset that “there is no specifically defined offense of ‘stalking’ or ‘harassment’ in the UCMJ,”¹¹³ the Air Force court discussed the three categories of offenses under Article 134, the general article: disorders and neglects to the prejudice of good order and discipline in the armed forces (clause 1); conduct of a nature to bring discredit upon the armed forces (clause 2); and federal crimes and offenses not capital (clause 3), including those state criminal statutes assimilated under the Assimilative Crimes Act (ACA) for areas of exclusive or concurrent federal jurisdiction.¹¹⁴ In *Rowe*, the ACA could not be used to assimilate

111. The harassment specification provided as follows:

That [appellant] did at or near Warner Robins, Georgia, on divers occasions between on or about 5 January 1997 and 19 February 1997 knowingly and willfully harass [A1C N.M.] by repeatedly contacting her telephonically and in writing, at her residence, refusing to leave her residence and following her without her consent, thereby causing the said [A1C N.M.] substantial emotional distress and reasonable fear of bodily injury.

Id. at 5-6.

112. *Id.* at 6.

113. *Id.*

114. *Id.* at 6-7; see MCM, *supra* note 12, pt. IV, ¶ 60c(i).

Georgia state law because the offenses occurred off base and thus outside an area of exclusive or concurrent federal jurisdiction.¹¹⁵

The Air Force court next considered the Georgia stalking law¹¹⁶ upon which the harassment charge had been modeled. The court noted that the statute had survived a void-for-vagueness challenge in Georgia state court, because the definition of harassment included the specific intent to cause substantial emotional distress or reasonable fear of bodily harm or injury.¹¹⁷ The military judge had defined harassment consistently with the Georgia statute.¹¹⁸ The Air Force court concluded, under the circumstances of appellant's case, that he could not reasonably have believed that his actions toward A1C N.M.—“compulsive telephoning, refusing to leave her residence, leaving unsolicited notes, and nonconsensual following”—were lawful.¹¹⁹

In *United States v. Diaz*,¹²⁰ a general court-martial convicted appellant of rape, threats and harassment, and cocaine use.¹²¹ The government charged the threat and harassment offenses under Article 134, UCMJ. At trial, appellant's defense counsel sought dismissal of the harassment specification (charged as a violation of clauses 1 and 2 of Article 134) for failure to state an offense because no such offense appeared in Article 134.¹²² The military judge denied the motion to dismiss, but failed to define

115. *Rowe*, slip op. at 7.

116. GA. CODE ANN. § 16-5-90 (1997) provides as follows:

A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purposes of harassing and intimidating the other person . . . For purpose of this article, the term “harassing and intimidating” means a knowing and willful course of conduct directed at a specific person which causes emotional distress

116. (continued)

by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves no legitimate purpose. This Code section shall not be construed to require that an overt threat of death or bodily injury has been made.

Rowe, slip op. at 8-9.

117. *Rowe*, slip op. at 9 (citing *Johnson v. State*, 449 S.E.2d 94 (1994)).

118. *Id.*

119. *Id.* slip op. at 11-12.

120. 39 M.J. 1114 (A.F.C.M.R. 1994).

121. *Id.* at 1115.

122. *Id.* at 1118-19.

“harass” when he instructed the members of the panel on the elements of that offense.¹²³ The Air Force Court of Military Review¹²⁴ held that the judge’s failure to properly instruct the members on the elements of the offense, including definitions of essential terms, constituted plain error: “‘Harassment’ was the gravamen of the offense. Without an understanding of what ‘harass’ or ‘harassment’ meant, the members could not properly determine if appellant criminally engaged in that conduct.”¹²⁵ Accordingly, the Air Force court set aside the harassment conviction.¹²⁶

IV. Current Military Practice Fails to Adequately Address Stalking

A. Review of Current Military Charging Practices

Based on the survey of military judges and the judicial opinions on stalking in the military justice system, the most common ways that military prosecutors charge stalking at courts-martial is through existing UCMJ articles such as Article 92 (violations of no-contact orders) and Article 134 (communication of a threat, conduct prejudicial to good order and discipline, or service-discrediting conduct). In addition to clauses 1 and 2 of Article 134, prosecutors also use clause 3 to assimilate state law offenses

123.

(1) On divers occasions at the time and place alleged, appellant wrongfully harassed CAY by stalking her and calling her repeatedly after being told not to call, trespassing at her home, and by making repeated, unwanted sexual advances, and (2) under the circumstances, appellant’s conduct was to the prejudice of good order and discipline in the armed forces or service discrediting.

Id.

124. On 5 October 1994, the service Courts of Military Review were renamed the Courts of Criminal Appeals. Thus, the service courts are now known as the United States

124. (continued) Air Force Court of Criminal Appeals, the United States Army Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, and the United States Coast Guard Court of Criminal Appeals. The United States Court of Military Appeals was renamed the United States Court of Appeals for the Armed Forces. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994).

125. *Diaz*, 39 M.J. at 1119.

126. *Id.*

under 18 U.S.C. § 13, or the 1996 federal anti-stalking statute, 18 U.S.C. § 2261A. Each of these approaches presents problems.

1. Existing UCMJ Provisions

a. Article 92, UCMJ

Prosecutors use Article 92 to charge stalking-type behavior as violations of lawful orders, such as stay-away or no-contact orders issued to service members by their commanders.¹²⁷ There are at least two significant problems with charging stalking violations in this manner. First, a conviction for violating a lawful order carries a maximum punishment of only six months' confinement, forfeiture of all pay and allowances, and a bad-conduct discharge.¹²⁸ This minor, misdemeanor-level punishment fails to squarely address the stalking behavior or recognize the conduct as a step on a continuum of potentially escalating violence.

Second, protective or restraining orders fail to serve as an effective means of deterring stalker behavior. Arrest or punishment on charges of assault and battery or other violations of law involves the offender versus the system, whereas arrest or punishment on charges of violating a restraining order involves the offender versus his victim.¹²⁹ Stalkers who are emotionally invested in relationships with their victims frequently ignore such orders.¹³⁰ Military personnel engaged in stalking behavior or embroiled in domestic disputes, such as Airman Rowe (the airman who repeatedly disobeyed his commander's order to stay away from his former girlfriend) or Sergeant Coffin (the Fort Campbell soldier who disregarded a state court order protecting his former fiancée and ultimately killed her),

127. *United States v. Rowe*, ACM 32852 (A.F. Ct. Crim. App. Apr. 7, 1999) (unpub.); Judge Survey, *supra* note 91.

128. MCM, *supra* note 12, pt. IV, ¶ 16e(2). Willful disobedience of a superior commissioned officer's lawful order under Article 90, UCMJ, carries a maximum punishment

128. (continued) of confinement for five years, forfeiture of all pay and allowances, and a dishonorable discharge. *Id.* pt. IV, ¶ 14e(2). To be lawful, such orders must have a valid military purpose. *Id.* pt. IV, ¶ 14c(2)(a)(iii). Based on the information available to the author, Article 90, UCMJ, is not commonly used to prosecute no-contact orders.

129. DE BECKER, *supra* note 6, at 229.

130. *See id.* at 227 ("Restraining orders are most effective on the reasonable person who has a limited emotional investment. In other words, they work best on the person least likely to be violent anyway."); *see also* TADEN & THOENNES, *supra* note 24, at 11 (reporting that stalking victims who obtained restraining orders, sixty-nine percent of women and eighty-one percent of men reported that their stalkers violated the order).

displayed no more obedience to such orders than their civilian counterparts.¹³¹ Indeed, the failure of protective orders to prevent the murders of four California women served as the impetus for the nation's first anti-stalking law in 1990.¹³²

b. Article 134, UCMJ (Communicating a Threat)

Prosecutors sometimes charge stalking as communicating a threat under Article 134.¹³³ To be guilty of this offense, a person must have "communicated certain language expressing a present determination or intent to wrongfully injure the person, property, or reputation of another person, presently or in the future."¹³⁴ A conviction for communicating a threat carries a maximum punishment of three years' confinement, forfeiture of all pay and allowances, and a dishonorable discharge.¹³⁵

The offense of communicating a threat is not an effective weapon to combat stalking, because stalkers often refrain from making overt threats against their victims. The NVAW Survey found that less than half of both female and male stalking victims reported that their stalkers overtly threatened them.¹³⁶ "[S]talkers do not always threaten their victim verbally or in writing; more often they engage in a course of conduct that, taken in context, causes a reasonable person to feel fearful."¹³⁷ The Air Force Court of Criminal Appeals disposed of an argument that appellant was not guilty of stalking because he had not assaulted his victim or communicated a threat:

The offense of which the appellant was convicted [violation of Article 134 assimilating Georgia stalking statute] does not require that either an offer to do harm or an overt threat to do harm be proved. (One might argue that a separate offense of stalking would not be needed if proof of stalking required proof that the offender communicated a threat to kill or injure the vic-

131. *Rowe*, slip op. at 9-12; *60 Minutes*, *supra* note 3.

132. 142 CONG. REC. H4457, 4458 (daily ed. May 7, 1996) (statement of Rep. Royce).

133. *See* *United States v. Diaz*, 39 M.J. 1114 (A.F.C.M.R. 1994); *see also* Judge Survey, *supra* note 91.

134. MCM, *supra* note 12, pt. IV, ¶ 110b(1).

135. *Id.* ¶ 110e.

136. TJADEN & THOENNES, *supra* note 24, at 7-8.

137. *Id.* at 8.

tim.) Rather, the offense of stalking requires a pattern of conduct which causes the victim emotional distress because she fears what is not overtly threatened: death or bodily injury.¹³⁸

Although the Model Code recommended that states define stalking without a requirement for an express threat,¹³⁹ state stalking statutes require a “credible threat” of violence. The Model Code encouraged states to adopt a definition of stalking that would include implied threats.¹⁴⁰

c. Article 134, UCMJ (The General Article)

Prosecutors sometimes use the General Article to craft stalking specifications as disorders or neglects. This may be the only technique available to charge stalking behavior that does not occur on a federal installation, such as off-post in the United States or anywhere outside of the United States.¹⁴¹ Use of the General Article to charge stalking offenses raises two problems. The first is the inevitable court challenges such specifications will generate based on the fact that the UCMJ does not prohibit stalking and that the specification therefore fails to state an offense. Related arguments are that the specification does not provide sufficient notice of criminality, that the conduct at issue is private, and that such conduct is neither prejudicial to good order and discipline (direct and palpable prejudice under clause 1) nor service discrediting (tending to lower the service in public esteem under clause 2).¹⁴² A prosecutor must establish the criminality of stalking under the particular circumstances of every case so charged.

The second problem with such Article 134 specifications charging stalking misconduct is that other punitive articles of the UCMJ may preempt part or all of such charges.¹⁴³ This limitation may severely undercut a stalking specification, which includes conduct such as damage to personal property,¹⁴⁴ assault,¹⁴⁵ or any conduct that is itself the subject of a no-

138. *United States v. Sweeney*, No. ACM 32026, slip op. at 10 (A.F. Ct. Crim. App. Jan. 17, 1997) (unpub.).

139. MODEL CODE, *supra* note 68.

140. *Id.*

141. *See United States v. Rowe*, ACM 32852 (A.F. Ct. Crim. App. Apr. 7, 1999) (unpub.); *see also* Judge Survey, *supra* note 91.

142. *Rowe*, slip op. at 6.

143. MCM, *supra* note 12, pt. IV, ¶ 60c(5)(a).

144. UCMJ art. 109 (2000).

contact order.¹⁴⁶ As an example, Airman Rowe engaged in many forms of misconduct toward his former girlfriend, including threats, assaults, repeated telephone calls, damage to her residence, and violation of a no-contact order.¹⁴⁷ Much of this misconduct could not be properly charged under Article 134 because it is preempted by other punitive articles of the UCMJ. Thus, if a prosecutor fails to charge the stalking conduct under each applicable UCMJ provision, then the conduct improperly included in the Article 134 specification—due to the preemption doctrine—is subject to dismissal. This mandates the separate charging of one course of conduct under several different punitive articles in what may appear to be an unreasonable multiplication of charges.¹⁴⁸ Such a requirement frustrates a prosecutor's effort to demonstrate at a court-martial that an accused's conduct is all a single course or pattern of conduct united by the common theme of stalking.

d. Assimilative Crimes Act

Federal prosecutors may use the ACA to assimilate state law for offenses committed in areas of exclusive or concurrent federal jurisdiction,¹⁴⁹ with the caveat that no federal criminal law (including the UCMJ) has defined an offense for the misconduct at issue.¹⁵⁰ The purpose of the

145. UCMJ art. 128.

146. UCMJ arts. 90, 92.

147. *Rowe*, slip op. at 5, 11-12.

148. "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." MCM, *supra* note 12, R.C.M. 307(c)(4), discussion.

149. Special maritime and territorial jurisdiction of the United States is defined as follows:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13(a) (2000).

150. MCM, *supra* note 12, pt. IV, ¶ 60c(4)(c)(ii).

ACA is to “fill in the gaps” in federal criminal law by adopting state criminal laws to address acts or omissions in areas of federal jurisdiction when such acts or omissions are not made punishable by any act of Congress.¹⁵¹ Article 134, clause 3 (crimes and offenses not capital) provides the vehicle for charging violations of state law in such cases.¹⁵²

Trial counsel have used Article 134 and the ACA to charge stalking offenses on military installations.¹⁵³ Problems with charging stalking offenses under the ACA include jurisdiction, that is, proof that the offense occurred in an area of exclusive or federal jurisdiction;¹⁵⁴ the real possibility of inconsistent results based on different definitions, elements, and punishments contained in the different states’ anti-stalking statutes;¹⁵⁵ and the fact that, by its very terms, the gap-filler ACA¹⁵⁶ leaves additional “gaps” for military prosecutors—those offenses committed off the military installation or offenses committed by personnel assigned outside the United States, its possessions or territories.

2. *Effect of Federal Anti-Stalking Statute on ACA Stalking Prosecutions*

Congressional enactment of a federal stalking law greatly reduced the availability of the ACA in prosecutions for stalking in areas of exclusive or concurrent federal jurisdiction. Military prosecutions for offenses under Article 134, UCMJ, may proceed under the ACA as long as the act or omission has not been made punishable by any enactment of Congress; if Congress has enacted a federal statute relating to the act or omission, then the question becomes whether the federal statute that applies to the act or omission precludes application of the state law in question.¹⁵⁷ Under *Lewis*,¹⁵⁸ Congress’s enactment of the Federal Stalking Punishment and

151. *United States v. Lewis*, 523 U.S. 155, 160 (1998) (citations omitted).

152. MCM, *supra* note 12, pt. IV, ¶ 60c(4)(a).

153. *See United States v. Sweeney*, 48 M.J. 117, 118-19 (1998); *see also* Judge Survey, *supra* note 91.

154. Judge Survey, *supra* note 91.

155. STALKING AND DOMESTIC VIOLENCE, *supra* note 4, app. A-D.

156. 18 U.S.C. § 13(a) applies only to areas within the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 7 (2000).

157. *United States v. Lewis*, 523 U.S. 155, 164 (1998) (setting forth a two-part test for determining the applicability of the ACA).

158. *Id.*

Prevention Act of 1996¹⁵⁹ requires an analysis of whether the federal statute precludes application of state stalking laws:

[I]t seems fairly obvious that the [Assimilative Crimes] Act will not apply where both state and federal statutes seek to punish approximately the same wrongful behavior—where, for example, differences among elements of the crimes reflect jurisdictional, or other technical, considerations, or where differences amount only to those of name, definitional language, or punishment. . . . Hence, ordinarily there will be no gap for the Act to fill where a set of federal enactments taken together make criminal a single form of wrongful behavior while distinguishing (say, in terms of seriousness) among what amounts to different ways of committing the same basic crime.¹⁶⁰

The federal stalking statute prohibits conduct crossing state lines or within the special maritime and territorial jurisdiction of the United States “with intent to injure or harass another person,” which conduct places another person “in reasonable fear of the death of, or serious bodily injury” to “that person or a member of that person’s immediate family.”¹⁶¹ The jurisdictional coverage is identical to that of the ACA.¹⁶² In light of the federal enactment, there appears to be no gap for the ACA to fill in the area of stalking within federal jurisdiction. In *Lewis*, the Supreme Court emphasized, “The primary question (we repeat) is one of legislative intent: Does applicable federal law indicate an intent to punish conduct such as the defendant’s to the exclusion of the particular state statute at issue?”¹⁶³

The language of the federal statute itself criminalizes stalking conduct occurring under two distinct circumstances. The first circumstance is “traveling across a State line,” defined as “a person who travels across a State line or enters or leaves Indian country.”¹⁶⁴ The second circumstance is “within the special maritime and territorial jurisdiction of the United States.”¹⁶⁵ Based on the plain language of the statute, Congress intended the reach of the statute to encompass both circumstances. Had Congress

159. 18 U.S.C. § 2261A (2000).

160. *Lewis*, 523 U.S. at 165.

161. 18 U.S.C. § 2261A. The applicable punishments range from five years to life imprisonment. 18 U.S.C. § 2261(b)(1)-(5).

162. 18 U.S.C. § 13(a).

163. *Lewis*, 523 U.S. at 166.

164. 18 U.S.C. §§ 2261(a)(1), 2261A.

165. 18 U.S.C. §§ 7, 2261A.

only intended to make the law consistent with the prohibition against interstate domestic violence,¹⁶⁶ then it need not have added the language about the special maritime and territorial jurisdiction of the United States—language that is absent from the interstate domestic violence statute.¹⁶⁷

Reasons given by the legislation's author on the floor of the House of Representatives the day that the House approved House Bill 2980 support the plain meaning of the federal anti-stalking statute.¹⁶⁸ Representative Royce stated that House Bill 2980 made crossing a state line to stalk someone or in violation of a restraining order a felony.¹⁶⁹ He then added that the legislation "makes it a felony to stalk someone on Federal property such as a post office or a military base or a national park."¹⁷⁰ The purpose of the legislation was to restore freedom of movement to stalking victims, who otherwise would lose the protection of their state laws if they moved to another state.

State laws are not the same and restraining orders obtained in one State may not be valid in another. This bill addresses that problem by making it a felony to cross a State line to stalk someone in violation of a restraining order, and in addition it protects victims on Federal property.¹⁷¹

Federal property includes military installations.

4. Federal Anti-Stalking Statute

In passing the Federal Stalking Punishment and Prevention Act of 1996, Congress intended for that statute to punish stalking conduct on federal property to the exclusion of state law assimilated under the ACA.¹⁷² However, certain problems common to ACA prosecutions still exist in assimilating the federal statute. As an example, the federal statute covers exactly the same jurisdictional territory as the ACA—with the same gaps. Military prosecutors may charge only that stalking conduct that actually occurs on a federal installation; actions off-post remain subject to state law.

166. 18 U.S.C. § 2261(a).

167. *Id.*

168. 142 CONG. REC. H4457, 4458 (daily ed. May 7, 1996) (statements of Rep. Royce).

169. *Id.*

170. *Id.*

171. *Id.*

This bifurcation deprives the military prosecutor of the ability to place an alleged stalker's entire course of conduct (crucial to a stalking prosecution) before a military court-martial, and also requires close coordination with state authorities to ensure that all of the stalker's conduct is appropriately investigated and prosecuted. Overseas, military prosecutors must still rely on clauses 1 and 2 of Article 134 specifications (now modeled perhaps on the federal statute) to charge stalking.

172. It is possible to conceive of a situation in which a person who lives or works on a military installation (under concurrent federal jurisdiction) in a given state would have had the opportunity to avail herself of the state's stalking laws and protective orders; for instance, she could have been a resident of the state prior to her affiliation with the federal government, or she could be a military family member residing off the installation. In that case, if she has availed herself of the state's laws and protections, then perhaps it would be reasonable to permit that state's law to be assimilated in a prosecution under the ACA. Except for such a situation, however, given Congress's overriding concern with protection of victims and their freedom of movement, application of the federal law would be appropriate. In light of the high degree of mobility associated with military members and their families, the federal law ought to become the default for stalking prosecutions on military installations absent a change to the UCMI or the *MCM*.

Although the vehicle for charging stalking on federal installations may have changed from state to federal law, jurisdictional knots remain. For the military, the only issue resolved by the passage of the federal anti-stalking law is the problem concerning different definitions and punishments contained in state stalking laws. Trial counsel's use of the federal statute to charge stalking offenses occurring on federal installations¹⁷³ will minimize inconsistent results. However, the limits on the application of the statute represent wide gaps preventing a coherent and fair approach to stalking in the military.

B. Reasons to Make Stalking a Military Offense

A central purpose of the criminal law is to define what crime is: "The substantive criminal law is that law which, for the purpose of preventing harm to society, declares what is criminal and prescribes the punishment to be imposed for such conduct."¹⁷⁴ Behavior is criminal only when a legislature has defined it as such and established a punishment for its commission; conduct not prohibited is, of course, no crime.¹⁷⁵ Another important purpose of the criminal law is to provide notice to the public as to what actions are criminal and their corresponding penalties.¹⁷⁶ Notice of criminality is especially important for an offense such as stalking, which may begin as lawful or innocuous behavior that annoys the recipient and later escalates to threatening or violent behavior that terrifies the recipient.¹⁷⁷ The Model Code emphasized the importance of a state's decision to treat stalking offenses seriously and advocated classification of stalking at the felony level. The Code also urged the states to establish a continuum of charges that law enforcement officials could use to intervene at various stages.¹⁷⁸

173. The author discovered only two military prosecutions under the federal anti-stalking statute. In both cases, the accused entered mixed pleas of guilty and obtained dismissal of the stalking charge as part of a pretrial agreement. *See* United States v. Boulton (JRTC & Fort Polk, Jan. 6, 2000); United States v. McDaniel, 52 M.J. 618 (1999) (stalking charge does not appear in opinion; appellate judge advised author of relevant case history by electronic mail, Oct. 28, 1999).

174. 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.2 at 8 (1986).

175. *Id.* at 12.

176. *Id.* at 12-13.

177. MODEL CODE, *supra* note 68.

178. *Id.*

Defining crimes and providing notice of prohibited behavior are important in military law, the purpose of which is as follows:

Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.¹⁷⁹

The Supreme Court has long recognized that the military is a society apart, subject to more rigorous standards and discipline than those applicable to civilian society: "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."¹⁸⁰ The special role played by military commanders is an integral part of the military's disciplinary system. To achieve the goal of maintaining good order and discipline, military law requires the effective participation of military commanders whose inherent authority over those service members under their command extends to matters of discipline under the UCMJ, nonjudicial punishment as well as courts-martial. Conduct that the UCMJ defines as criminal and the notice of criminality that inclusion in the UCMJ provides are essential for both those who administer discipline and those who are subject to it.

To be effective, an anti-stalking provision must be a tool at the disposal of commanders, who are in the best position to impose discipline on service members in efforts to resolve problems at the lowest possible level. The military law that commanders use is the UCMJ. The criminalization of stalking and its addition to the listed offenses in the UCMJ would enhance the ability of commanders to address stalking behavior at an early stage. Commanders could cite to the specific anti-stalking provision when administering nonjudicial punishment¹⁸¹ or when issuing an administrative memorandum of reprimand. Most importantly, commanders could assemble a record that accurately reflects the true nature of stalking mis-

179. MCM, *supra* note 12, pt. I ¶ 3.

180. *Parker v. Levy*, 417 U.S. 733, 758 (1974) (upholding the constitutionality of Articles 133 and 134 of the UCMJ against void for vagueness and overbreadth challenges).

181. 10 U.S.C. § 815 (2000).

conduct and permits an appropriate punishment in the event that a service member is ultimately tried by court-martial.

Punishment or separation from the service, however, is not the only goal of the UCMJ.¹⁸² Deterring others from misconduct furthers the goal of maintaining good order and discipline. If nonjudicial punishment or discipline imposed on others deters a would-be stalker from committing misconduct, then good order and discipline improve. Punishment is not the only goal of the military justice system: “The armed forces have long recognized that the object of any criminal law is not alone to punish the offender or wreak revenge upon him for the harm he has done but to provide such a penalty as will deter or discourage others from committing the acts prohibited.”¹⁸³

In addition to notice of what behavior is criminal and fair treatment under the law for offenders at all disciplinary levels, the military has a duty to protect and assist the victims of crime. Congress,¹⁸⁴ the Department of Defense,¹⁸⁵ and all of the military services¹⁸⁶ recognize the importance of protecting crime victims. Victims of federal crimes have the following rights:

The right to be treated with fairness and with respect for your dignity and privacy; the right to be reasonably protected from the accused offender; the right to be notified of court proceedings;

182. In sentencing cases, the military recognizes “rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution.” MCM, *supra* note 12, R.C.M. 1001(g). The military also recognizes the protection of society as a valid sentencing consideration. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK, ¶ 239 (30 Jan. 1998).

183. Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1, 54 (1995) (quoting 4 MORRIS O. EDWARDS & CHARLES L. DECKER, *THE SERVICEMAN AND THE LAW* 23 (6th ed. 1951)).

184. Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1501, 1503, 1505, 1510, 1512-1515, 3146, 3579-3580 (1988); Victims of Crime Act of 1984, 42 U.S.C. §§ 10601-10603 (1988); Victims’ Rights and Restitution Act of 1990, 42 U.S.C. §§ 10606-10607 (Supp. III 1991).

185. U.S. DEP’T OF DEFENSE, DIR. 1030.1, VICTIM AND WITNESS ASSISTANCE (23 Nov. 1994); U.S. DEP’T OF DEFENSE, INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (23 Dec. 1994).

186. U.S. DEP’T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, ¶¶ 18-1—18-26 and app. D (20 Aug. 1999); U.S. DEP’T OF AIR FORCE, INSTR. 51-201, VICTIM AND WITNESS ASSISTANCE (25 Apr. 1997); SECNAVINST 5800.11A, VICTIM AND WITNESS ASSISTANCE PROGRAM (16 June 1995); U.S. MARINE CORPS, ORDER 5800.15A, VICTIM AND WITNESS ASSISTANCE PROGRAM (3 Sept. 1997).

the right to be present at all public court proceedings related to the offense, unless the court determines that your testimony would be materially affected if you as the victim heard testimony at trial; the right to confer with the attorney for the government in the case; the right to available restitution; the right to information about the conviction, sentencing, imprisonment, and release of the offender.¹⁸⁷

Victims may be entitled to transitional compensation for dependent abuse offenses¹⁸⁸ or to compensation for damage to or theft of their personal property.¹⁸⁹

Protecting stalking victims and safeguarding their privacy present special challenges for the military. Because the very nature of the crime is pursuit, stalking victims are particularly vulnerable. The location and duty assignment of military victims are available through use of military personnel locators and the Freedom of Information Act.¹⁹⁰ Civilian victims may enjoy more privacy, but the reality of life in an Internet society means that a determined searcher or stalker can locate most people, or hire someone to do so for money.¹⁹¹ Maintaining privacy may be difficult or impossible in cases of intimates or former intimates, who may have children together. Legal, investigative, and social service organizations must work

187. DD Form 2701, Initial Information for Victims and Witnesses of Crime (Dec. 94).

188. 10 U.S.C. § 1059 (2000).

189. *Id.* § 939.

190. 5 U.S.C. § 552 (2000). The DOD Privacy Program permits release of agency organizational rosters and telephone directories, including names, duty assignments, duty addresses, duty telephone numbers, and even duty e-mail addresses (except for personnel assigned to units that are sensitive, routinely deployable, or stationed in foreign territories). U.S. DEP'T OF DEFENSE, REG. 5400.7-R, FREEDOM OF INFORMATION ACT PROGRAM, para. 3-200 (14 Apr. 1997); Memorandum, Director, Department of Defense Directorate for Freedom of Information and Security Review, subject: Duty E-mail Addresses (26 Oct. 1999). U.S. Army regulations mirror DOD policy. U.S. DEP'T OF ARMY, REG. 25-55, INFORMATION MANAGEMENT: RECORDS MANAGEMENT: THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM, para. 3-200, Number 6b (14 Apr. 1997); U.S. DEP'T OF ARMY, REG. 340-21, OFFICE MANAGEMENT: THE ARMY PRIVACY PROGRAM, para. 3-3a(1) (5 July 1985). *Cf.* Schwaner v. Department of the Air Force, 898 F.2d 793 (D.C. Cir. 1990) (holding that Exemption 2 of the FOIA did not permit withholding of personnel rosters including names, duty assignments, and unit addresses and telephone numbers to the public).

191. The Internet provides numerous "people finders," such as 1800USSEARCH ("FIND OUT ABOUT ANYONE!"), People Finder Search Services, and U.S. Locator's People Search Services, which charge a fee to locate current and previous addresses, telephone numbers, and other personal information about people.

with commanders at all stages of the proceedings to ensure protection of victims. Addition of an anti-stalking measure to the body of military law is a necessary first step in raising the awareness of the military establishment about stalking and its effects on the victims.

A provision prohibiting stalking would address problems of jurisdiction, applicability, and fairness. The ready availability of such a provision would eliminate problems of jurisdiction, because the UCMJ applies to service members worldwide, not just those who commit offenses on federal installations. Because jurisdiction is determined according to military status, offenses are punishable under the UCMJ whether committed on or off the military installation, in the United States or overseas.¹⁹² In terms of fairness and consistency, all service members would be subject to the same elements and the same maximum punishment for stalking misconduct. In short, a standard anti-stalking measure would provide the military with a means to approach the offense in a manner that is just for both offenders and victims.

V. Proposed Solution

Current military practice, including the use of existing UCMJ provisions and assimilation of state and federal law, is inadequate to address the unique aspects of stalking crimes. Jurisdictional barriers and gaps prevent the military from pursuing a consistent and reasoned course to combat stalking in the ranks. The best way to address stalking in the military would be through legislative action, that is, for Congress to enact a law adding a new anti-stalking provision to the UCMJ. In light of the passage of the Federal Stalking Punishment and Prevention Act of 1996 (with its express application to federal military installations) and other recent congressional proposals to expand the statute's reach, however, it is unlikely that Congress will take such action anytime in the near future, if at all.

The most expedient and effective alternative to congressional legislation is executive action. The President may use his rule-making authority to amend the *Manual for Courts-Martial (MCM)*.¹⁹³ A valid *MCM* provision has the force and effect of law, and the President's authority in prescribing rules of procedure is constrained only by the requirement that such rules be consistent with the Constitution and other provisions of the

192. See 10 U.S.C. §§ 802, 803.

UCMJ or *MCM*.¹⁹⁴ The President has used his authority to add offenses to Article 134, UCMJ.¹⁹⁵

The addition of the proposed anti-stalking provision to the *MCM*,¹⁹⁶ modeled on the California anti-stalking statute, is consistent with state and federal court practice. The proposed provision draws primarily on the most recent version of the California law, the nation's oldest and most evolved anti-stalking measure, which prohibits both harassment and repeated conduct. The California law, which has survived court challenges as to its validity,¹⁹⁷ requires only that the victim fear for his or her safety, or the safety of his or her immediate family,¹⁹⁸ not the higher standard of fear of bodily injury or death required by some state laws, the new federal statute, and even the Model Code. The "credible threat" requirement is satisfied by either written or verbal threats, or threats that may be implied from a pattern of conduct. The intent requirement is satisfied upon proof that the accused made a credible threat with the intent to place the targeted

193.

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

10 U.S.C. § 836(a). Chief Judge Cox of the U.S. Court of Appeals for the Armed Forces has cited UCMJ art. 56 (Maximum limits) as the basis for the President's authority to identify particular misconduct under Article 134 and differentiate it from other misconduct through elements of proof. *United States v. Izquierdo*, 51 M.J. 421, 422 (1999); *United States v. Bivins*, 49 M.J. 328, 329-30 (1999). "The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." 10 U.S.C. § 856.

194. *United States v. Kelson*, 3 M.J. 139, 140-41 (C.M.A. 1977); *United States v. Johnson*, 42 C.M.R. 66, 68 (1970).

195. Added offenses include wrongful interference with an adverse administrative proceeding (Exec. Order No. 12,888) and self-injury without intent to avoid service (Exec. Order No. 12,960). *MCM*, *supra* note 12, app. 25, Historical Executive Orders. Recently added is the offense of reckless endangerment. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

196. *See* Appendix, *infra*.

197. *See* cases cited *supra* note 53.

198. CAL. PENAL CODE §646.9(a) (Deering 1999) (Notes, 1993 Amendment).

person in reasonable fear for his safety or the safety of his or her immediate family.

The proposed provision also adopts some of the recommendations advanced by the Model Code. The explanation portion of the proposal does not contain a list of examples of stalking behavior. The rationale is based on the fact that some courts have interpreted an illustrative list of examples to be exclusive, thus limiting the behaviors that may be properly charged as stalking.¹⁹⁹ Given the creativity and ingenuity applied to stalking and harassing conduct by its perpetrators,²⁰⁰ risking a narrow interpretation is unwise.

California's approach to stalking intent, adopted in the proposal, is consistent with the Model Code's implied threat standard. The Code recommended that states not require a "credible threat," as that term was often limited to overt verbal or written threats, and stalkers frequently avoid making such overt threats.²⁰¹ Instead, the Code recommended that the states use the language "threats implied by conduct" in order to capture that conduct which, taken in context, would cause a reasonable person fear. The proposal adopts California's use of the term "credible threat," and includes the state's definition of that term which includes not only verbal or written threats but also threats implied by conduct. Like the California statute, the proposal does not adhere to all of the Model Code recommendations concerning intent. The Model Code recommended that states adopt stalking statutes that required only the intent to engage in a purposeful course of conduct when a person knows or should know that it will cause fear in the victim.²⁰² Like most states, California's statute requires both a course of conduct and the specific intent to cause fear.²⁰³

The California statute sets a relatively low level of punishment for stalking: misdemeanor penalties of one year and a \$1000 fine for cases not involving violations of restraining orders or repeat offenders.²⁰⁴ By contrast, the federal stalking law sets punishments beginning at five years' imprisonment and increasing to ten to twenty years, or life for cases result-

199. MODEL CODE, *supra* note 68.

200. Judge Survey, *supra* note 91 (noting that one accused ordered a pink dumpster delivered to his victim's home).

201. MODEL CODE, *supra* note 68.

202. *Id.*

203. CAL. PENAL CODE § 646.9(a) (Deering 1999).

204. *Id.* § 646.9(a)-(c).

ing in the death of the victim.²⁰⁵ The federal approach is consistent with the Model Code recommendation to establish felony penalties for stalking offenses.²⁰⁶ In an effort to balance these competing levels of punishment for stalking and to make the penalty for stalking under the *MCM* consistent with related UCMJ provisions, the proposal establishes a two-tier punishment scheme.

The penalties for stalking in the military would occupy a middle ground, more severe than the misdemeanor approach of many states but less severe than the serious felony treatment set forth in the federal statute. For stalking offenses, the penalty of a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years would be the same as that specified for communicating a threat under Article 134.²⁰⁷ For aggravated stalking offenses (defined as violating a protective order, targeting a child, or using a weapon), the penalty of six years' confinement would be within the range of punishments specified for aggravated assault under Article 128.²⁰⁸

The California model is appropriate for the military because it criminalizes acts constituting harassment, crimes not currently found in the UCMJ. Making repeated telephone calls or sending e-mail messages of a nonconsensual nature meets this definition, as does sending unwanted gifts or trespassing. Stalkers typically engage in these behaviors at an early stage in order to get their victims' attention. Later on the stalking continuum, stalkers may commit more serious acts that are properly the subject of other UCMJ articles, such as damage to private or government property, assault, or even murder. Mechanisms already exist to prosecute and punish these acts; what is lacking is a means to intervene at an early stage to stop stalking behavior before it escalates to infliction of injury or other violence.

205. 18 U.S.C. §§ 2261, 2261A (2000).

206. MODEL CODE, *supra* note 68.

207. MCM, *supra* note 12, pt. IV, ¶ 110e.

208. The maximum punishment for assault consummated by a battery upon a child under the age of sixteen years is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years. *Id.* pt. IV, ¶ 54e(7). The maximum punishment for assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years; the maximum confinement term increases to eight years if the weapon used is a loaded firearm. *Id.* pt. IV, ¶ 54e(8)(b), (a).

There is an overlap between acts that constitute stalking and acts already prohibited by the UCMJ. Because the proposal suggests adding the anti-stalking provision to Article 134, the issue of preemption remains.²⁰⁹ Trial counsel will have to charge acts that may be part of a stalker's overall course of conduct under separate articles of the UCMJ, not under a single stalking specification.²¹⁰ At courts-martial, trial counsel should address this issue by emphasizing that the prosecution's theory of the case is stalking, that the charges—though disparate in type and severity—represent a pattern or course of conduct by the alleged stalker, and that all of the charged acts are united by the desire to inspire fear in the victim.

VI. Conclusion

Stalking represents actions on a continuum, with behavior ranging from annoying to terrifying and potentially deadly. There is no magic formula to predict stalker behavior. Ignoring the early, relatively minor signs such as harassment and implied threats may ultimately result in serious injury or even death for the victim. All states and the federal government have recognized that stalking is a crime and have taken steps to increase awareness and deterrence of stalking as well as its prosecution and punishment.

More than ten million stalking victims have experienced fear, frustration, and terror at the hands of their stalkers, often for months or even years. Like the society from which its members are drawn, the military has stalkers in its ranks, as evidenced by appellate court decisions and the observations and experiences of current military judges. There is no way to determine how many cases involving stalking are resolved through methods other than court-martial, or even how many court-martial charges for stalking do not survive the judicial process.

Unlike civilian jurisdictions, the military currently has no effective means to combat stalking. Existing UCMJ provisions are inadequate. To

209. *Id.* pt. IV, ¶ 60c(5)(a).

210. "Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense." *Id.* R.C.M. 307(c)(4). "There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses." *Id.* at discussion. As a general rule, "all known charges should be referred to a single court-martial." *Id.* R.C.M. 601(e)(2), discussion.

ensure that the military treats stalking as a crime, it must be defined as a crime between the covers of the *MCM*. An anti-stalking provision in the *MCM* represents a necessary first step in combating stalking. Enacting such a provision now demonstrates that the military is taking a proactive stance on stalking, far better than a reactive approach in the wake of a tragedy.

APPENDIX

**EXECUTIVE ORDER XXXXX
AMENDMENTS TO THE MANUAL FOR
COURTS-MARTIAL, UNITED STATES**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. §§ 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order No. 12,473, as amended by Executive Order No. 12,484, Executive Order No. 12,550, Executive Order No. 12,586, Executive Order No. 12,708, Executive Order No. 12,767, Executive Order 12,888; Executive Order 12,936; Executive Order 12,960; Executive Order 13,086; and Executive Order 13,140, it is hereby ordered as follows:

Section 1. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

The following new paragraph is inserted after paragraph XX:

XX. Article 134 (Stalking)

a. *Text.* See paragraph 60.

b. *Elements.*

(1) *Stalking.*

(a) That the accused willfully, maliciously, and repeatedly followed another person, or that the accused harassed another person;

(b) That the accused made a credible threat, either express or implied by conduct, with the intent to place the person so followed or harassed in reasonable fear for his or her safety, or the safety of his or her immediate family; and

(c) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) Aggravated stalking.

(a) That the accused willfully, maliciously, and repeatedly followed another person, or that the accused harassed another person;

(b) That the accused made a credible threat, either express or implied by conduct, with the intent to place the person so followed or harassed in reasonable fear for his or her safety, or the safety of his or her immediate family;

(c) That the accused engaged in said conduct by:

(i) violating a restraining or protective order, injunction, or other valid order issued by a court of competent jurisdiction; or

(ii) targeting a child under the age of sixteen years; or

(iii) using or displaying a dangerous or deadly weapon; and

(d) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation.* For purposes of this paragraph, the following definitions apply:

(1) “Followed” means maintained a visual or physical proximity to another person without legitimate purpose;

(2) “Harassed” means a knowing and willful course of conduct directed at a specific person that seriously alarmed, annoyed, tormented, or terrorized the person and that served no legitimate purpose;

(3) “Credible threat” means a verbal or written threat, including that performed through the use of an electronic communication device, made with the intent to place the person who is the target in reasonable fear for

his or her safety or the safety of his or her immediate family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. A credible threat need not be express; it may be implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her immediate family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. It is not necessary to prove that the accused had the intent to actually carry out the threat. The present confinement of an accused who makes a credible threat shall not be a defense under this paragraph.

(4) “Course of conduct” means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “course of conduct.”

(5) “Electronic communication device” includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers.

(6) “Immediate family” means any spouse, parent, child, sibling, or any other person who regularly resides in the household of the targeted person, or who within the previous six months regularly resided in the household of the targeted person.

d. *Lesser included offenses.* Article 80—attempts.

e. *Maximum punishment.*

(1) *Stalking.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(2) *Aggravated stalking.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 6 years.

f. *Sample specifications.*

(1) In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20__, stalk _____ by (willfully, maliciously, and repeatedly following _____, by maintaining a visual or physical proximity to _____, spying on _____, going to _____'s home or place of work) (harassing _____, by making nonconsensual telephone calls, trespassing, sending/ mailing/ delivering unwanted letters, gifts, or other items, sending unwanted electronic communication).

(2) In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, 20__, stalk _____ (a child under the age of 16 years) by (willfully, maliciously, and repeatedly following _____, by maintaining a visual or physical proximity to _____, spying on _____, going to _____'s home or place of work) (harassing _____, by making nonconsensual telephone calls, trespassing, sending/ mailing/ delivering unwanted letters, gifts, or other items, sending unwanted electronic communication such as e-mail or fax) (in violation of a restraining/protective/court order)(accompanied by use/display of a dangerous/deadly weapon).

DEVELOPMENT, ADOPTION, AND IMPLEMENTATION OF MILITARY SENTENCING GUIDELINES

MAJOR STEVEN M. IMMEL¹

I. Introduction

The U.S. Army convicted Private First Class Looney of unpremeditated murder and sentenced him to 120 months of confinement.² In a case with similar facts, the U.S. Army convicted a second soldier, Private First Class Saulsberry, of unpremeditated murder and sentenced him to confinement for 360 months.³ The difference in adjudged confinement was 240 months.

Seaman (E-3) Kirkman, U.S. Navy, was convicted of rape at a general courts-martial and sentenced to eighty-nine days of confinement.⁴ In a similar factual scenario, the U.S. Navy successfully prosecuted Hospital

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2. *United States v. Looney*, 48 M.J. 681 (Army Ct. Crim. App. 1998). Private First Class (PFC) Looney was convicted by a military judge sitting as general court-martial. On the night of 12-13 November 1994, PFC Looney and some friends were drinking at several clubs. He got into an argument with the victim, who was a good friend. The argument turned into a fight, and PFC Looney stabbed the victim once, killing him. *Id.* at 683.

3. *United States v. Saulsberry*, 47 M.J. 493 (1998). Private First Class Saulsberry was convicted at a general court-martial by a panel composed of officer and enlisted members. On the day of the incident PFC Saulsberry, the victim, and other soldiers were in PFC Saulsberry's barracks room watching television. The victim and PFC Saulsberry got into an argument. The argument turned into a fight, and PFC Saulsberry stabbed the victim once, killing him.

4. *United States v. Kirkman*, NMCM 98 01264, 2000 CCA LEXIS 61 (N.M. Ct.

Apprentice (E-2) Iberra for rape, but he was sentenced to forty-eight months of confinement.⁵ The confinement adjudged in these two cases varied by forty-five months.

The U.S. Air Force convicted Airman First Class Johnson of five specifications involving methamphetamine and marijuana use and distribution. He was sentenced to thirteen months of confinement.⁶ U.S. Army Private Goodenough was convicted of two specifications involving possession and distribution of methamphetamines. He was sentenced to sixty-one months of confinement.⁷ Although his case involved fewer charges, Private Goodenough was adjudged forty-eight more months of confinement than Airman Johnson.

The examples above illustrate the problem of unwarranted sentence disparity. To solve this problem, this article proposes military sentencing guidelines. Military sentencing guidelines will reduce sentence disparity while retaining much of the current military sentencing system.

Unwarranted sentence disparity exists when individuals convicted of similar crimes receive unequal sentences.⁸ Congress determined that unwarranted sentencing disparity does not promote the goals of federal sentencing.⁹ To remedy this, Congress created the United States Sentencing Commission and tasked the Commission with developing a sentencing system that reduced sentence disparity.¹⁰ Congress told the Commission

4. (continued) *Crim. App.* 2000). Seaman Kirkman was convicted at a general court-martial by a panel of officer and enlisted members. At the time of the rape, the victim was drunk and regained consciousness while Seaman Kirkman was raping her.

5. *United States v. Ibarra*, 53 M.J. 616 (N.M. Ct. *Crim. App.* 2000). Ibarra was convicted at a general court-martial by a panel of officer and enlisted members. At the time of the rape, the victim was drunk and regained consciousness while Ibarra was raping her.

6. Data from Major Erin Hogan, USAF, Military Justice Division, U.S. Air Force, (18 Feb. 2000) [hereinafter *Air Force Data*]. It is interesting that while all of the four branches (Army, Navy, Air Force, Marine Corps) maintained sentencing records and a sentencing data base, not one of the branches kept any records regarding sentence uniformity.

7. Data from Joseph Neurauter, Clerk of Court, U.S. Army Court of Criminal Appeals, Arlington, Va. (22 Feb. 2000) [hereinafter *Army Data*]. The data consisted of rank of the accused, findings, and adjudged sentence during the calendar year 1999. The data was used to calculate an average sentence and sentencing range for the various punitive articles.

8. UNITED STATES SENTENCING COMMISSION, *FEDERAL SENTENCING GUIDELINES MANUAL* (1998) [hereinafter *USSG*].

9. 28 U.S.C. § 991 (2000); 18 U.S.C. § 3553 (2000). The goals of federal sentencing are: just punishment, deterrence, incapacitation, and rehabilitation.

10. 28 U.S.C. § 991.

to create a sentencing system that reduced sentence disparity by “formulat[ing] federal trial judges in their sentencing decisions.”¹¹ The Commission created the federal sentencing guidelines to satisfy its mandate to reduce sentence disparity.¹²

Currently, the federal system and thirty-three of the states employ some form of sentencing guidelines¹³ to combat unwarranted sentence disparity.¹⁴ By contrast, the military justice system does not use sentencing guidelines.¹⁵ Instead, the military uses a system that allows the sentencing authority¹⁶ almost complete discretion.¹⁷ This divergent approach to sentencing is troublesome considering that the sentencing goals of the federal system and the military system are remarkably alike.¹⁸ Both systems pursue the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline.¹⁹

This article discusses military sentencing guidelines in seven sections. Section II discusses the military sentencing process; while Section III gives similar information for the federal system. Both sections are

11. *Id.*

12. UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES (undated) [hereinafter OVERVIEW]. Truth in sentencing was another factor that led to the creation of the United States Sentencing Commission and the federal sentencing guidelines.

13. Adriaan Lanni, *Note: Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1779 n.14 (1999). Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin currently employ a form of sentencing guidelines for criminal offenses.

14. OVERVIEW, *supra* note 12.

15. Neither the Sentencing Reform Act of 1984 nor the United States Sentencing Commission expressly applies to the military justice system.

16. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 903 (1998) [hereinafter MCM]. This Rule defines sentencing authority in the military context to be the person or persons who determine the sentence. The sentencing authority may be a military judge, officer members, or a panel made up of officer and enlisted members.

17. *Id.* R.C.M. 1002.

18. *Compare* 18 U.S.C. § 3553(a)(2) (2000) (listing just punishment, deterrence, incapacitation, and rehabilitation as sentencing goals) *with* U.S. DEP'T OF ARMY, PAM 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 64 (30 Sept. 1996) [hereinafter BENCHBOOK] (listing punishment, deterrence, protection of society, rehabilitation, and maintaining good order and discipline as sentencing goals).

19. *Compare* 18 U.S.C. § 3553(a)(2) *with* BENCHBOOK, *supra* note 18, at 64.

divided into a history subsection and a subsection explaining the current sentencing process. These sections are included for two reasons. First, they provide the reader with a basic understanding of the workings of both sentencing systems. This is critical because the proposed military sentencing guidelines are a hybrid of the federal and military sentencing system. Second, Sections II and III illustrate that while the sentencing goals of the military and federal system are almost identical,²⁰ the approaches employed by the two systems are dissimilar.²¹ Sections II and III highlight that the federal system makes sentence uniformity a priority while the military system does not.

Section IV illustrates the degree of sentence disparity that currently pervades the military justice system. Section IV discusses sentencing data collected from four branches of the military.²² It then calculates the standard deviation²³ for a variety of punitive articles. This section discusses the standard deviation that attaches to several punitive articles to demonstrate the wide range of confinement that currently exists within the military.

Section V proposes that the military adopt sentencing guidelines by advancing a unique military sentencing matrix. This section provides the

20. Compare 18 U.S.C. § 3553; 28 U.S.C. § 991 (2000), with BENCHBOOK, *supra* note 18, at 64. The goals of sentencing in the federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

21. Compare MCM, *supra* note 16, with USSG, *supra* note 8.

22. The United States Army, United States Navy, United States Air Force, and the United States Marine Corps.

23. MICROSOFT ENCARTA ENCYCLOPEDIA (1999) [hereinafter ENCARTA].

The standard deviation of a set of measurements x_1, x_2, \dots, x_n , where the mean is defined as the square root of the mean of the squares of the deviations; it is usually designated by the Greek letter sigma (σ). In symbols

$$\sigma = \sqrt{\frac{1}{n} [(x_1 - \bar{x})^2 + (x_2 - \bar{x})^2 + \dots + (x_n - \bar{x})^2]} = \sqrt{\frac{1}{n} \sum (x_i - \bar{x})^2}$$

The square, σ^2 , of the standard deviation is called the variance. If the standard deviation is small, the measurements are tightly clustered around the mean; if it is large, they are widely scattered.

Id.

framework under which sentencing guidelines would be implemented and applied in the military system.

Section VI addresses various criticisms commonly levied against the federal sentencing guidelines. This section argues that the proposed military sentencing guidelines overcome these criticisms through a number of features that are unique to the proposed military sentencing guidelines.

Section VII proposes legislative and executive changes necessary to implement military sentencing guidelines. Most of the recommended changes modify existing Rules for Courts-Martial (R.C.M.).²⁴ While these changes would implement sentencing guidelines, they would also preserve the majority of the current military sentencing system.

This article concludes that the military should adopt the proposed sentencing guidelines as a solution to the problem of unwarranted sentence disparity.

II. Summary of Military Sentencing Procedures

This section provides an orientation to the military sentencing system, which, when combined with section III, will enable the reader to compare and contrast the military and federal sentencing system. Comparing and contrasting the two systems will be important when assessing the viability of adopting military sentencing guidelines.

A. History of Military Sentencing

The military code of discipline for the Colonial Army of the United States was the American Articles of War of 1775.²⁵ The American Articles were born from the British Code. The British Code can be traced to General Adolphus's 1621 Code of Articles.²⁶ The Articles of War outlined military court-martial procedures and were the precursor to the *Manual for*

24. MCM, *supra* note 16, R.C.M. 1001-1010.

25. See Captain Anthony J. DeVico, *Evolution of Military Law*, 21 JAG J. 63, 63-66 (1966). See also W. WINTHROP, *MILITARY LAW & PRECEDENTS* 47 (2d ed. 1920).

26. WINTHROP, *supra* note 25, at 907-918. The family tree of military justice in the United States can be traced to The Code of Articles signed by Swedish General Gustavus Adolphus in 1621. Similar to the Uniform Code of Military Justice of today, the code of the 17th Century gave the sentencing authority near complete sentencing discretion.

Courts-Martial.²⁷ The Articles of War of 1775 gave panel members great latitude in fashioning a sentence.²⁸ Court-martial sentencing remained remarkably consistent from 1775 until the enactment of the Uniform Code of Military Justice (UCMJ) in 1950.²⁹

Before the *Manual for Courts-Martial* was enacted in 1951, a separate sentencing hearing was not a formal part of a court-martial.³⁰ Evidence presented on the merits was used to form the sentence when an individual was found guilty.³¹ An exception was the guilty plea, which incorporated a quasi-hearing, to assist the sentencing authority in forming a sentence.³² A sentencing hearing was necessary to provide the sentencing authority with the information required to fashion an appropriate sentence.³³ This information was often mitigation evidence in the form of good military character.³⁴

The pre-1951 *Manuals for Courts-Martial* gave the court members general guidance regarding sentencing determinations. The *Manual for Courts-Martial* of 1928 told members to consider former discharges, previous convictions, and circumstances that tend to mitigate, extenuate, or aggravate either the offense or collateral consequences of the offense.³⁵ The 1949 version of the *Manual for Courts-Martial* directed members to consider the accused's background, uniformity in sentencing, general deterrence, and discipline.³⁶ Of particular note is that sentence uniformity was a sentencing goal in the 1949 *Manual for Courts-Martial*.³⁷

27. See WINTHROP, *supra* note 25, at 907-18. See also Colonel William F. Fratcher, *History of the Judge Advocates General's Corp, United States Army*, 4 MIL. L. REV. 89 (1966).

28. See Robert O. Rollman, *Of Crimes, Courts-Martial and Punishment-A Short History of Military Justice*, 11 A.F. L. REV. 213, 215 (1969).

29. See *supra* notes 26-28 and accompanying text.

30. See Captain Denise K. Vowell, *To Determine an Appropriate Sentence in the Military Justice System*, 114 MIL. L. REV. 87, 108-09 (1986).

31. *Id.* at 109-10 (quoting S. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL (1862)).

32. See WINTHROP, *supra* note 25, at 278-80.

33. See Vowell, *supra* note 30, at 109.

34. See WINTHROP, *supra* note 25, at 278-80, 396-400. Character evidence could also serve as a defense on the merits.

35. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1928) [hereinafter 1928 MANUAL].

36. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1949) [hereinafter 1949 MANUAL]. See Vowell, *supra* note 30, at 118.

37. See 1949 MANUAL, *supra* note 36; Vowell, *supra* note 30, at 118.

The Military Justice Act of 1950³⁸ resulted in the UCMJ and the *Manual for Courts-Martial* of 1951.³⁹ Much of the emphasis behind the Military Justice Act surrounded concerns about the ability of the military justice system to fashion just sentences.⁴⁰ So suspect were the sentences adjudged during World War II that the Secretary of War remitted or reduced eighty-five percent of the sentences submitted to the clemency board of review.⁴¹

The 1951 *Manual for Courts-Martial* made a number of changes to the military justice system, attempting to protect the rights of the individual soldier and to closely mirror the civilian criminal justice system.⁴² The *Manual for Courts-Martial* of 1951 developed a distinct sentencing hearing for every court-martial.⁴³ Sentencing hearings were adversarial.⁴⁴ The government could present aggravation evidence subject to defense cross-examination.⁴⁵ The defense enjoyed wide discretion in presenting extenuation and mitigation evidence, to include the accused making a statement.⁴⁶ The changes implemented in 1951 were the genesis of the current sentencing procedures.

The 1951 *Manual for Courts-Martial* gave members general guidance on what to consider when fashioning an appropriate sentence.⁴⁷ The

38. The Military Justice Act of 1950, Pub. L. No. 506-169, 64 Stat. 107.

39. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter 1951 MANUAL].

40. See Arthur E. Farmer & Richard H. Wels, *Command Control-or Military Justice?*, 29 N.Y.U. L. REV. 263 (Apr. 1949). See also DeVico, *supra* note 25, at 66; Major Kevin Lovejoy, *Abolition of Court Member Sentencing*, 142 MIL. L. REV. 1, 17 (1993). The focus of the post-World War II criticisms was that the military conducted too many courts-martial and that the resulting punishment were, at times, unjust.

41. See Farmer & Wels, *supra* note 40, at 265. See also *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 before the Subcom. On Armed Services*, 81st Cong. 1 (1949) (statement of Arthur E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association and Richard H. Wels, Special Committee on Military Justice, New York County Lawyers' Association).

42. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before the Subcom. On Armed Services*, 81st Cong. 37 (1949) (statement of James Forrestal, Secretary of Defense and Prof. Edmund Morgan Jr., Harvard Law School).

43. 1951 MANUAL, *supra* note 39, ¶ 75 (1951).

44. *Id.*; Lovejoy, *supra* note 40, at 18.

45. 1951 MANUAL, *supra* note 39.

46. *Id.* ¶ 75; Lovejoy, *supra* note 40, at 18-19.

47. See 1951 MANUAL, *supra* note 39, ¶ 76. See also Lovejoy, *supra* note 40, at 19; Vowell, *supra* note 30, at 35-36.

1951 *Manual* urged members to limit the use of the maximum sentence.⁴⁸ The *Manual* further mandated that members use their own discretion when fashioning a sentence.⁴⁹ Additionally, sentence uniformity was retained as a sentencing goal.⁵⁰

The next major change to the *Manual* occurred in 1969. The 1969 version of the *Manual for Courts-Martial* removed sentence uniformity as a sentencing goal.⁵¹ Abandoning sentence uniformity has its origin in the Court of Military Appeal case of *United States v. Mamaluy*.⁵² In *Mamaluy*, the law officer⁵³ instructed the members that they could consider sentence uniformity when fashioning a sentence. The *Mamaluy* court determined that instructing the members as to sentence uniformity was inappropriate.⁵⁴ The court found the sentence uniformity instruction faulty because panel members do not have the requisite information necessary to adjudge a uniform sentence.⁵⁵ The *Mamaluy* court did not say that sentence uniformity was an inappropriate goal of sentencing.⁵⁶ Rather, the *Mamaluy* court found that court-martial members were not adequately equipped to consider sentence uniformity.⁵⁷

The *Mamaluy* court explained that court-martial members do not have exposure to a wide enough spectrum of cases to apply sentence uniformity. Further, the *Mamaluy* court found: “Military Courts have little continuity, and confusion would result if they sought to equalize sentences without being fully informed.”⁵⁸ Because the panel could never be “fully informed,” sentence uniformity could not be applied to a court-martial by

48. 1951 MANUAL, *supra* note 39, ¶ 76a.

49. *Id.* ¶ 76. See Vowell, *supra* note 30, at 120.

50. Compare 1951 MANUAL, *supra* note 39, ¶ 76 (a)(4) (members were instructed that when fashioning a sentence they should strive for sentence uniformity. “Among other factors which may properly be considered are the penalties adjudged in other cases for similar offenses. With due regard for the nature and seriousness of the circumstances attending each particular case, sentences should be relatively uniform throughout the armed forces . . .” (emphasis added)) with 1949 MANUAL, *supra* note 36, ¶ 80 (that also included an instruction that made sentence uniformity a sentencing goal).

51. MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 76 (1969) [hereinafter 1969 MANUAL].

52. *United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959).

53. The law officer was the predecessor of the military judge.

54. *Mamaluy*, 27 C.M.R. at 104-07.

55. *Id.* at 180.

56. *Id.* at 179-81.

57. *Id.* at 180.

58. *Id.*

a military panel. Accordingly, the *Mamaluy* court advised Congress that Article 76(a) of the 1951 *Manual for Courts-Martial* delete any mention of sentence uniformity.⁵⁹

The *Manual for Courts-Martial* experienced additional modifications in 1981, 1984, 1995, and 1998.⁶⁰ Like the 1969 *Manual*, these modifications did not mention sentence uniformity. The result of these modifications is the sentencing procedures used in the military today.

B. The Current Military Sentencing Process

This subsection discusses the current military sentencing system in five parts. Part 1 summarizes the current sentencing process while Part 2 explains the wide degree of sentence discretion given to sentencing authorities. Next, Part 3 discusses the military's treatment of sentence uniformity. Part 4 briefly elaborates on the stated goals of military sentencing. Finally, Part 5 shows that 10 U.S.C. § 836⁶¹ has not influenced military sentencing.

1. Overview of Military Sentencing

The overview of the military sentencing system begins with forum selection.⁶² An enlisted accused may elect a panel of all officers, choose a panel comprised of at least one-third enlisted representation, or, request a trial by military judge alone.⁶³ If the accused is an officer, he may request trial by either officer members or military judge alone.⁶⁴

59. *Id.* at 181.

60. MCM, *supra* note 16; MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1995); MANUAL FOR COURTS-MARTIAL UNITED STATES (1984); MANUAL FOR COURTS-MARTIAL, UNITED STATES (1981); 1969 MANUAL, *supra* note 51.

61. 10 U.S.C. § 836 (2000).

62. MCM, *supra* note 16, R.C.M. 903. This rule grants the accused the right to request trial by military judge. This right is not absolute and the judge may deny the request for good cause.

63. *Id.* An accused may elect members for both merits and sentencing, a military judge for both merits and sentencing, plead guilty before a military judge but have members determine the sentence, or plead guilty before a military judge and have the military judge determine the sentence.

64. *Id.*

Upon a finding of guilty, the court-martial must follow the procedures outlined in Chapter X of the *Manual for Courts-Martial*.⁶⁵ The sentencing procedures are adversarial.⁶⁶ The trial counsel is allowed to present five types of evidence: information about the accused taken from the charge sheet, personal data contained in the official personnel records of the accused, evidence of any prior military or civilian criminal convictions, aggravating circumstances directly relating to (or resulting from) the offense of which the accused was found guilty, and opinion evidence regarding the accused's rehabilitative potential.⁶⁷ The government may not solicit from a witness whether an accused should receive a punitive discharge.⁶⁸ The Military Rules of Evidence govern the trial counsel's presentation.⁶⁹ The trial counsel's entire sentencing case is often called, (and will be referred to in this article as), the case in aggravation.

Upon the conclusion of the case in aggravation, the accused is permitted to present his case. The defense is allowed to present matters in extenuation and mitigation.⁷⁰ Matters in extenuation attempt to explain the circumstances surrounding the crime.⁷¹ Matters in mitigation attempt to lessen punishment or create a record for clemency purposes.⁷² Mitigation evidence can include any positive trait that relates to the accused.⁷³ Upon a request from the accused, the military judge may relax the rules of evidence. If the rules are relaxed, the defense may present extenuation and mitigation evidence that would not be admissible on the merits.⁷⁴ If the judge relaxes the rules of evidence, the rules remain relaxed for the government's case in rebuttal.⁷⁵

65. *Id.* ch. X.

66. *Id.* R.C.M. 1001.

67. *Id.* R.C.M. 1001(a)(1)(A), (b)(1)-(5). The trial counsel is prohibited from presenting evidence that falls outside of these strictly construed parameters. The government is prohibited from soliciting details from the witnesses as to why a witness may believe that an accused does not possess rehabilitative potential.

68. *Id.* R.C.M. 1001(b)(5)(D).

69. *Id.* pt. III.

70. *Id.* R.C.M. 1001; BENCHBOOK, *supra* note 18, at 62-63.

71. MCM, *supra* note 16, R.C.M. 1001.

72. *Id.* R.C.M. 1001(c)(1)(B).

73. *Id.* R.C.M. 1001(c).

74. *Id.* R.C.M. 1001(c)(3), 1001(e). For example, if the judge determines that the production of a witness is not necessary, the judge may receive testimony through alternate means (e.g., telephone, video conferencing, and affidavit).

75. *Id.* R.C.M. 1001(c)(3), 1001(d).

Regardless of whether or not the judge relaxed the rules of evidence, the accused may make an in-court statement part of his extenuation and mitigation case.⁷⁶ The accused can make a sworn statement, an unsworn statement, or a combination of the two.⁷⁷ A sworn statement is subject to cross-examination⁷⁸ while an unsworn statement is not subject to cross-examination.⁷⁹ The accused may make an unsworn statement orally, in writing, through his counsel, or a combination of the above.⁸⁰ The government may rebut any statement of fact presented in the accused's unsworn statement.⁸¹

Upon the conclusion of the defense's sentencing case, the government may rebut the defense case. Likewise, the defense may surrebut the government's rebuttal case. Rebuttal and surrebuttal may continue at the discretion of the military judge.⁸²

Upon conclusion of rebuttal and surrebuttal, the government and defense may present sentencing arguments.⁸³ While the trial counsel may not claim to speak for the convening authority (or for higher authorities),⁸⁴ the trial counsel may argue for a specific lawful sentence.⁸⁵ The trial counsel may relate the specific sentence to the sentencing goals of rehabilitation of the accused, specific deterrence of the accused, social retribution, and general deterrence.⁸⁶ Neither the trial counsel or the defense counsel may make sentence uniformity a part of their argument.⁸⁷

2. Sentencing Discretion

Upon the conclusion of government and defense argument, the sentencing authority has the freedom to fashion any lawful sentence.⁸⁸ Every

76. *Id.* R.C.M. 1001(c)(2).

77. *Id.*

78. *Id.* R.C.M. 1001(c)(2)(B); BENCHBOOK, *supra* note 18, at 58.

79. MCM, *supra* note 16, R.C.M. 1001(c)(2)(C).

80. *Id.* R.C.M. 1001(c).

81. *Id.* R.C.M. 1001(c)(2)(C); BENCHBOOK, *supra* note 18, at 58.

82. MCM, *supra* note 16, R.C.M. 1001(d).

83. *Id.* R.C.M. 1001(g).

84. *Id.*

85. *Id.* R.C.M. 1001(g), 1003.

86. *Id.* R.C.M. 1001(g); BENCHBOOK, *supra* note 18, at 64.

87. *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959).

88. MCM, *supra* note 16, R.C.M. 1002.

crime under the *Manual for Courts-Martial* has an attendant maximum punishment.⁸⁹ The maximum punishment for multiple offenses is determined by aggregating the maximum punishment for each violation of the *Manual for Courts-Martial*.⁹⁰ The sentencing authority is obligated to adjudge a mandatory minimum sentence in the rare circumstance where the accused is found guilty of Article 106, Spying or Article 118, Murder.⁹¹

The sentencing authority, be it military judge or members, has a wide range of options available when fashioning an appropriate sentence.⁹² The sentencing authority may adjudge no punishment.⁹³ If the sentencing authority determines that punishment is appropriate, the sentencing authority may adjudge any combination of the following: reprimand,⁹⁴ forfeiture of pay and allowances,⁹⁵ fine,⁹⁶ reduction in pay grade for enlisted members,⁹⁷ restriction,⁹⁸ hard labor without confinement,⁹⁹ confinement,¹⁰⁰ dismissal in the case of officers,¹⁰¹ punitive discharge in the case of enlisted,¹⁰² and death when authorized by the punitive articles.¹⁰³

89. See *id.* pt. IV. See also *id.* app. 12 (displaying a chart which demonstrates the maximum punishment allowable for each offense).

90. MCM, *supra* note 16, R.C.M. 1003.

91. 10 U.S.C. § 918 (2000). Imprisonment for life is the mandatory minimum sentence for violation of Article 118(1) premeditated murder and Article 118(4) felony murder. Death is the mandatory sentence for violation of Article 106 (spying).

92. MCM, *supra* note 16, R.C.M. 1002. The sentencing authority may not exceed the maximum punishment. Only spying and murder carry a mandatory minimum sentence.

93. *Id.*

94. *Id.* R.C.M. 1003(b)(1). A court-martial may only recommend a reprimand. The approval and wording of a reprimand is left to the discretion of the convening authority.

95. *Id.* R.C.M. 1003(b)(2).

96. *Id.* discussion accompanying R.C.M. 1003(b)(3). Fines should only be adjudged when the accused was unjustly enriched because of the offense committed.

97. *Id.* R.C.M. 1003(b)(5).

98. *Id.* R.C.M. 1003(b)(6). Restriction may be substituted for confinement but not more than two-months restriction may be substituted for every one month of confinement and in no case may a member be sentenced to more than two months of confinement.

99. *Id.* R.C.M. 1003(b)(7). Hard labor without confinement may be substituted for confinement but not more than 45 days of hard labor without confinement may be substituted for every 30 days of confinement and in no case may a member be sentenced to more than 90 days of hard labor without confinement.

100. *Id.* R.C.M. 1003(b)(8).

101. *Id.* R.C.M. 1003(b)(9)(A).

102. *Id.* R.C.M. 1003(b)(9)(B), (C). Punitive discharges for enlisted members may be either a dishonorable discharge or a bad conduct discharge. A dishonorable discharge is the more severe of the two discharges and may only be awarded at a general court-martial when authorized by the *Manual for Courts-Martial*.

Despite having a wide range of sentencing options available, the sentencing authority has little guidance on how to actually form a sentence.¹⁰⁴ The primary guidance that the sentencing authority receives is directed to the maximum sentence that may be adjudged.¹⁰⁵ In addition, the members receive guidance on the effect that adjudging a punitive discharge and confinement (or confinement in excess of six months) has on the accused's pay and allowances.¹⁰⁶ The members also receive instructions on the voting procedures that should be followed and that the members are "solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority"¹⁰⁷

After the sentence is adjudged, the accused may submit matters to the convening authority and request that the convening authority set aside or lessen the severity of the sentence.¹⁰⁸ The convening authority's staff judge advocate will make a recommendation to the convening authority as to what action the convening authority should take.¹⁰⁹

103. *Id.* R.C.M. 1003(b)(10). Death may be adjudged for violations of Article 85 (desertion in time of war), Article 90 (disobeying a superior commissioned officer in time of war), Article 94 (mutiny and sedition), Article 99 (misbehavior before the enemy), Article 100 (subordinate compelling surrender), Article 101 (improper use of countersign), Article 102 (forcing safeguard), Article 104 (aiding the enemy), Article 106 (spying), Article 106a(a)(1)(A)-(D) (espionage), Article 110 (Willfully and wrongfully hazarding a vessel), Article 113 (misbehavior of sentinel or lookout in time of war), Article 118(1) or (4) (murder), and Article 120 (rape).

104. BENCHBOOK, *supra* note 18, at 64, states:

In adjudging a sentence, you are restricted to the kinds of punishment which I will now describe or you may adjudge no punishment. There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of [his] crime(s) and [his] sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

Id.

105. *Id.*

106. *Id.* at 66-68.

107. MCM, *supra* note 16, R.C.M. 1005(e)(4).

108. *Id.* R.C.M. 1105.

109. *Id.* R.C.M. 1106.

The convening authority also enjoys a wide degree of discretion and can take any action that decreases the effect of either the findings or sentence adjudged by the court-martial.¹¹⁰ This includes the authority to “[c]hange a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.”¹¹¹ “The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased.”¹¹²

3. Sentence Uniformity

The sentencing authority does not receive guidance regarding sentence uniformity. As discussed previously, sentence uniformity was deleted as a sentencing goal in the 1969 *Manual for Courts-Martial*.¹¹³ The *Mamaluy* court recommended eliminating the sentence uniformity instruction largely because of lack of confidence in the ability of members to apply the uniformity instruction.¹¹⁴

While sentence uniformity is no longer a sentencing goal addressed in the *Manual for Courts-Martial*, sentence uniformity is a matter subject to review by the Court of Criminal Appeals.¹¹⁵ Congress has tasked the Court of Criminal Appeals with maintaining “relative” sentence unifor-

110. *Id.* R.C.M. 1107.

111. *Id.* R.C.M. 1107(c)(1).

112. *Id.* R.C.M. 1007(d)(1). In addition to review by the convening authority, each accused is entitled to appellate defense counsel unless the accused knowingly waives that right. The military appellate defense counsel is provided at no cost to the accused. The appellate defense counsel represents the accused before either the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the United States Supreme Court. The appellate defense counsel has the duty to identify and raise appellate issues affecting the accused.

Upon the conclusion of appellate review, the accused is either granted a form of relief or the court-martial is finalized. The accused may request a new trial by petitioning the appropriate judge advocate general. The accused must petition the judge advocate general within two years of the approval of the court-martial sentence by the convening authority. The grounds for a new trial are (1) newly discovered evidence or (2) fraud on the court-martial.

113. See notes 51-57 and accompanying text.

114. *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959).

115. See 10 U.S.C. §§ 866-867 (2000). See also *United States v. Lacy*, 50 M.J. 286, 288 (1999).

mity.¹¹⁶ The U.S. Court of Appeals for the Armed Forces and the service Court of Criminal Appeals have defined relative uniformity very narrowly.¹¹⁷ Relative uniformity is limited to addressing sentence uniformity between cases that arise out of the same criminal act (that is, three accused convicted of a sexual assault on the same victim at the same time).¹¹⁸ The accused may challenge his sentence by arguing that other closely related cases resulted in sentences that were much more lenient than the sentence he received.¹¹⁹ If he successfully argues that his sentence is disparate, the burden shifts to the government to show that a rational basis exists for the sentence disparity.¹²⁰

Very few sentences will be determined to be disparate by either the Court of Criminal Appeals or the Court of Appeals for the Armed Forces. The Court of Appeals for the Armed Forces will review a lower court decision on two grounds, whether the lower court abused its discretion, or whether the ruling of the lower court resulted in an obvious miscarriage of justice.¹²¹ Compounding this already high standard is that in determining whether the lower court abused its discretion (or rendered a decision that resulted in a miscarriage of justice) the court compares the adjudged sentence to the maximum sentence authorized for the crime.¹²² Because the military system aggregates the maximum confinement for each specification that the accused is convicted of, the attendant maximum confinement often far exceeds the adjudged sentence.¹²³

4. *The Goals of Military Sentencing*

While the military employs a unique sentencing process, the goals of the military system are not unique.¹²⁴ In its most basic form, the military seeks to balance the needs of the military, to include good order and disci-

116. *United States v. Judd*, 28 C.M.R. 388, 394 (C.M.A. 1960).

117. *Lacy*, 50 M.J. at 286.

118. *Id.* at 289; *United States v. Fee*, 50 M.J. 290, 291 (1999).

119. *Lacy*, 50 M.J. at 288.

120. *Id.*

121. *Id.*

122. *Id.*

123. MCM, *supra* note 16, R.C.M. 1003. *See also* Army Data, *supra* note 7, Data from Lieutenant Commander Steve Jamozy, USN, Navy-Marine Corps Trial Judiciary, Washington, D.C. (21 Jan. 2000) [hereinafter USN/USMC Data]; Air Force Data *supra* note 6.

124. MCM, *supra* note 16, pt. I. "The purpose of military law is to promote justice,

pline, against the needs of the individual service member.¹²⁵ The desire to balance good order and discipline against individual rights was one of the primary factors that led to the *Manual for Courts-Martial* of 1951.¹²⁶ The *Manual for Courts-Martial* of 1951 led to the sentencing procedures that are followed today.

The goals of the current military sentencing system are “rehabilitation of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of [his] crime(s) and [his] sentence from committing the same or similar offense.”¹²⁷ The sentencing authority does not receive any further explanation of what is meant by “rehabilitation” or the other sentencing goals. The sentencing authority does not receive any instructions regarding sentence uniformity. Like other aspects of the military sentencing system, the members are given complete discretion as to how to apply the above sentencing goals.¹²⁸

5. *Military Sentencing and 10 U.S.C. § 836*

The military employs a sentencing system that is very different than the federal sentencing system and the sentencing systems employed by a majority of the states.¹²⁹ While the current military sentencing system is unique, Congress and the President have demonstrated a desire that the military criminal justice system approximate the federal justice system.¹³⁰ Congress has tasked the President, where practicable, to apply federal “principles of law and rules of evidence” to the military justice system.¹³¹

124. (continued) to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” *Id.*

125. *Id.* See DeVico, *supra* note 25; *Uniform Code of Military Justice: Hearings on H.R. 2498 before the Subcomm. On Armed Services*, 81st Cong. 37 (1949) (statement of James Forrestal, Secretary of Defense and Prof. Edmund Morgan Jr., Harvard Law School).

126. See DeVico, *supra* note 25, at 66.

127. See BENCHBOOK, *supra* note 18, at 64.

128. *Id.* The military judge instructs the members that the weight to be given to the sentencing goals “along with all other sentencing matters in this case, rests solely within your discretion.” *Id.*

129. Lanni, *supra* note 13, at n.14.

130. 10 U.S.C. § 836 (2000); MCM, *supra* note 16.

131. 10 U.S.C. § 836.

The President has taken steps to ensure that the military justice system approximates the federal justice system. Most notably, he has ensured that the Military Rules of Evidence closely mirror the Federal Rules of Evidence.¹³² The President has not taken similar action to create a military sentencing system that approximates the federal sentencing system. The military sentencing system fashions individualized punishment by granting the sentencing authority a large degree of sentencing discretion.¹³³ Conversely, the present federal system attempts to maximize sentence uniformity by constraining judicial sentencing discretion with the use of sentencing guidelines.¹³⁴ The next section discusses the federal system and how sentencing guidelines were implemented.

III. Summary of Federal Sentencing Guidelines

Like the military system, the federal justice system has its own unique sentencing history. When the needs of the state warrant punishing an individual, the federal system employs sentencing guidelines.¹³⁵ This section discusses the history of federal sentencing and the development and implementation of federal sentencing guidelines.

A. History of Federal Sentencing Prior to Guidelines

Before the Sentencing Reform Act of 1984,¹³⁶ trial judges in the federal system had almost unfettered discretion in fashioning sentences.¹³⁷ The sentencing discretion enjoyed by federal judges was very similar to the sentencing discretion presently enjoyed in the military system.¹³⁸ The

132. Compare MCM, *supra* note 16, pt. III with FED. R. EVID. See also MCM, *supra* note 16, app. 22.

133. United States v. Lacy, 50 M.J. 286, 287-88 (1999).

134. USSG, *supra* note 8, at 2.

135. *Id.*

136. Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. §§ 3551-3673 (2000), 28 U.S.C. §§ 991-998 (2000)). The Federal Sentencing Guidelines became effective on 1 November 1987. The guidelines overcame constitutional challenges and were fully effective January 1989. See Joan Tagliareni, Comment, *Actual Contamination in the Federal Sentencing Guidelines: To Prove or Not to Prove*, 22 B.C. ENVTL. AFF. L. REV. 413 (1995).

137. Kate Stith & Jose A. Carbanes, *Symposium: The Federal Sentencing Guidelines: Ten Years Later: Judging Under the Federal Sentencing Guidelines*, 91 Nw. U. L. REV. 1247 (1997).

138. MCM, *supra* note 16, R.C.M. 903. A military accused may be sentenced by either military members or by a military judge.

only barrier that the federal judge encountered when fashioning punishment was statutory maximum sentences.¹³⁹

The statutory maximum sentence was historically the only limit imposed on federal judges.¹⁴⁰ Before sentencing guidelines, a federal trial judge's sentence was subject to judicial review only if the sentence exceeded the statutory maximum.¹⁴¹ The standard of review surpassed the already high abuse of discretion standard.¹⁴² The standard of appellate review was whether the sentence was lawful.¹⁴³

When fashioning a lawful sentence, the federal judge could choose from a host of sentencing theories. These sentencing theories have been the subject of much debate.¹⁴⁴ The primary focus of the debate was what should be the primary goal of sentencing.¹⁴⁵ Some argued that the sentence should punish the individual.¹⁴⁶ Others thought that confinement could correct behavior and rehabilitate the wrongdoer.¹⁴⁷ A third camp urged that sentencing should operate to remove the convicted from free society.¹⁴⁸

At the turn of the last century, the *Old Testament*¹⁴⁹ values of retribution and restitution were the dominant sentencing philosophy.¹⁵⁰ The trial

139. *Williams v. New York*, 337 U.S. 241 (1949).

140. See Charles J. Ogletree, Jr., *Commentary: The Death of Discretion? Reflections on The Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940-41 (1988). See also Ilene H. Nagel, *Supreme Court Review: Foreword: Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883 (1990) (discussing the history of Western sentencing). Of particular note is that federal sentencing has historically been dominated by judge alone sentencing. Ms. Nagel's article also provides an excellent history of the expansion of judicial discretion.

141. See Herbert J. Hoelter et al., *Practicing Law in the Americas: The New Hemispheric Reality: Article: Future Trends in the United States Federal Sentencing Scheme*, 13 AM. U.J. INT'L L. & POL'Y 1069 (1998). See also Stith & Carbanes, *supra* note 137, at 1251-53.

142. See Hoelter et al., *supra* note 141, at 1078.

143. See Stith & Carbanes, *supra* note 137, at 1251-53.

144. *Id.*

145. *Id.*

146. See Ogletree, *supra* note 140, at 1941-42.

147. *Id.*

148. See Hoelter et al., *supra* note 141, at 1075.

149. *Exodus* 21:24-25. "If her eye is injured, injure his; if her tooth is knocked out, knock out his; and so on—hand for hand, foot for foot, burn for burn, wound for wound, lash for lash."

150. See Ogletree, *supra* note 140, at 1940.

judge enjoyed almost complete discretion to fashion “the punishment that fit the crime.”¹⁵¹ With the growth of the social sciences that accompanied the first quarter of the Twentieth Century, the sentencing goals of retribution and restitution came under attack.¹⁵² The social sciences argued that they could cure society’s problems through intervention in the socio-economic fabric of American life.¹⁵³

Eager to cure the problems that plagued criminal justice, the government looked to the social sciences to fix the criminal justice system.¹⁵⁴ The sentencing philosophy of this period was deterrence and rehabilitation.¹⁵⁵ Poverty and social forces were considered the root cause of crime.¹⁵⁶ The prisons created workshops, vocational training, and other avenues of social engineering to defeat these negative social forces.¹⁵⁷ The rehabilitation theory advocated that once the criminal “graduated” his course of study at the correctional facility, he was fit for return to society.¹⁵⁸ The social sciences promised that the graduate of the correctional facility would have a low probability of recidivism.¹⁵⁹ Penitentiaries were renamed correctional facilities to illustrate this shift from penitence to correction.¹⁶⁰

The rehabilitative model spawned growth in the parole system.¹⁶¹ The Parole Commission determined the amount of confinement actually served by the convict.¹⁶² Before 1974, the bulk of sentences were indeterminate.¹⁶³ An indeterminate sentence gave the Parole Commission the authority to parole a prisoner at any time. The Parole Commission could

151. *Id.* The only constraint placed on a trial judges’ sentence was the statutory maximum punishment allowed.

152. See Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 1920 (1995).

153. *Id.*

154. See Stith & Carbanes, *supra* note 137, at n.7 (citing Probation Div., Admin. Office of the U.S. Courts, Pub. No. 105).

155. *Id.*

156. See Green, *supra* note 152, at 1920-21.

157. See Hoelter et al., *supra* note 141, at 1078-80.

158. See Green, *supra* note 152, at 1921.

159. See Tagliareni, *supra* note 136, at 416.

160. See Hoelter et al., *supra* note 141, at 1079.

161. See Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, n.14 (1999) (reviewing KATE STITH & JOSE A. CARBANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998)).

162. See Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, at 699 (1996).

parole someone within days of being confined. A judge also had the option of adjudging a "straight sentence."¹⁶⁴ With a "straight sentence," the prisoner was eligible for parole after serving one-third of the sentence.¹⁶⁵ In either case, the Parole Commission determined when an individual was "cured" and released.¹⁶⁶

While the parole officer influenced the amount of confinement served, the probation officer affected the adjudged sentence.¹⁶⁷ The probation officer, an employee of the judiciary,¹⁶⁸ is responsible for providing a presentencing report to the bench.¹⁶⁹

Before the implementation of guidelines, the presentencing report contained a summary of the case on the merits, status of codefendant trials, application of parole to the case, and the personal history of the defendant.¹⁷⁰ The personal history included "family background, education, military service, work history, criminal record, dependents, and activities in the community."¹⁷¹ The probation officer would also recommend a sentence to the judge.¹⁷² Only the judge received the sentencing recommendation portion of the report.¹⁷³ This portion was advisory and the judge was free to give it great weight or no weight at all.¹⁷⁴ The prosecution and the defense received the remainder of the report.¹⁷⁵

Political pressure and disappointment with the rehabilitative model eventually resulted in the development and implementation of the federal sentencing guidelines.¹⁷⁶ Disappointment with the rehabilitative model

163. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *YALE L.J.* 1681, 1685 (1992). An indeterminate sentence is a sentence that left the issue of parole to the sole discretion of the Parole Commission.

164. See Hoelter et al., *supra* note 141, at 1078.

165. *Id.*

166. See Green, *supra* note 152, at 1689.

167. See Stith & Carbanes, *supra* note 137, at 1249.

168. *Id.* at 1249-50.

169. *Id.*

170. *Id.*

171. Compare *id.* at 1249 with USSG, *supra* note 8, pt. H (largely eliminating the ability of the federal court to consider the personnel history traits of the defendant).

172. Stith & Carbanes, *supra* note 137, at 1249-50.

173. *Id.* at 1250 (quoting Probation Division., Admin. Office of U.S. Courts, Pub. No. 105, *The Presentence Investigative Report* 6 (1978)).

174. Stith & Carbanes, *supra* note 137, at 1249-50.

175. *Id.*

176. *Id.*

grew out of doubt in the ability of prisons to rehabilitate.¹⁷⁷ Experts also questioned the ability of parole boards to evaluate a prisoner's state of rehabilitation.¹⁷⁸

Pat Brown,¹⁷⁹ former Governor of California, chaired a commission responsible for reporting to Congress on the state of the federal criminal system.¹⁸⁰ The Brown Commission cited sentence disparity as one of the major defects of federal sentencing.¹⁸¹ The Commission stated that the unfettered sentencing authority of federal trial judges was the primary cause of sentence disparity.¹⁸² The Brown Commission concluded that the federal judicial system needed major reform.¹⁸³

B. Federal Sentencing, Post Guidelines

The political call for sentencing reform gained momentum through the 1980s.¹⁸⁴ The growing crime rate, disparity in sentencing, early release of criminals, and constituents urging their representatives to be "tough on crime" led to bipartisan support for sentencing reform.¹⁸⁵ Senator Strom Thurman (Republican) and Senator Edward Kennedy (Democrat) sponsored the Comprehensive Crimes Control Act of 1984.¹⁸⁶ This act resulted in the Sentencing Reform Act of 1984¹⁸⁷ and created the United States

177. Tagliareni, *supra* note 136, at 416.

178. *See id.*; *see also* Hoelter et al., *supra* note 141, at 1079-80.

179. Currently the Mayor of the City of Oakland, California.

180. *See* UNITED STATES SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY (June 18, 1987) [hereinafter SUPPLEMENTARY REPORT].

181. *See* Hoelter et al., *supra* note 141, at 1078-82.

182. *Id.*

183. *See* SUPPLEMENTARY REPORT, *supra* note 180, Hoelter et al., *supra* note 140, at 1078-82.

184. *See* Hoelter et al., *supra* note 141, at 1074; Wright *supra* note 161, at 1361. *See also* Interview with Paul Hoffer, Senior Sentencing Research Associate, United States Sentencing Commission (July 20, 2000). Congress used a combination of antidotal material and various reports to conclude that unwarranted sentence disparity existed within the federal sentencing system. A primary means of testing the hypothesis that sentence disparity existed was through judicial simulation. Judicial simulation involved providing various judges with the same sentencing case, and comparing the sentences that the various judges would award. These simulations resulted in disparate sentences and supported the view that unwarranted sentence disparity existed in the federal sentencing system.

185. *See* Freed, *supra* note 163, at 1689.

186. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984) (codified as amended in several sections of Title 18 in the U.S. Code). *See* Wright, *supra* note 161, at 1361.

Sentencing Commission.¹⁸⁸ The United States Sentencing Commission published the first federal sentencing guidelines in November of 1987.¹⁸⁹ Those guidelines became fully effective January of 1989.¹⁹⁰

The charter of the United States Sentencing Commission is to:¹⁹¹

[P]rovide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices¹⁹²

The U.S. Sentencing Commission is an eight member independent section of the judicial branch.¹⁹³ The U.S. Attorney General (or her designee) is a nonvoting member. The President appoints the remaining seven members after consultation with the criminal justice community and the Senate.¹⁹⁴ The panel must contain members of both political parties.¹⁹⁵ The U.S. Sentencing Commission develops and monitors the federal sentencing guidelines.¹⁹⁶

187. Pub. L. No. 98-473, 98 Stat. 1837, 1987 (codified at 18 U.S.C. §§ 3551-3673 (2000)), 28 U.S.C. §§ 991-998 (2000)).

188. 28 U.S.C. § 991(a).

189. See Witten, *supra* note 162, at 701.

190. See Tagliareni, *supra* note 136.

191. 28 U.S.C. § 991(b)(1)(B).

192. See *id.*

193. See *id.* § 991(a).

194. *Id.*

195. *Id.*

The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chair and three of whom shall be designated by the president as Vice Chairs. At least three of the members shall be Federal judges . . . Not more than four members of the Commission shall be members of the same political party.

Id.

196. USSG, *supra* note 8, ch. 1, pt. A.

As discussed in the introduction, the goals of criminal punishment in the federal system are deterrence, incapacitation, just punishment, and rehabilitation.¹⁹⁷ These four goals are identical to four of the five military sentencing goals.¹⁹⁸ The additional goal in the military is maintaining good order and discipline.¹⁹⁹ The military pursues its sentencing goals using sentencing discretion and individual sentencing.²⁰⁰ The federal system pursues its goals through the U.S. Sentencing Commission and the use of sentencing guidelines. Sentencing goals should not be confused with sentencing objectives.²⁰¹ Sentencing goals relate to why an individual is punished.²⁰² Sentencing objectives relate to the goals of the sentencing system in meting out that punishment.²⁰³

The Sentencing Commission's mission is to satisfy the sentencing objectives of honesty, uniformity, and proportionality by using sentencing guidelines. The first objective, honesty in sentencing, was accomplished through the abolition of parole.²⁰⁴ Since implementing guidelines, the sentence adjudged is the sentence served with the exception of good time credit.²⁰⁵ Inmates can no longer be paroled.²⁰⁶

The second objective is sentence uniformity.²⁰⁷ The Sentencing Commission believes that by decreasing sentence disparity it increases sentence uniformity.²⁰⁸ The Commission argues that sentencing guide-

197. See 18 U.S.C. § 3553 (2000); 28 U.S.C. § 991. See also USSG, *supra* note 8, ch. 1, pt. A.

198. Compare 18 U.S.C. § 3553; 28 U.S.C. § 991, with BENCHBOOK, *supra* note 18, at 64. The goals of sentencing in the federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

199. BENCHBOOK, *supra* note 18, at 64.

200. MCM, *supra* note 16, R.C.M. 1002.

201. Compare USSG, *supra* note 8, ch. 1, pt. A (sentencing objectives of the federal system are honesty, uniformity and proportionality) with MCM, *supra* note 16, pt. I, ¶ 3 (stating that the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States).

202. 18 U.S.C. § 3553; 28 U.S.C. § 991.

203. USSG, *supra* note 8, ch. 1, pt. A, ¶ 3.

204. *Id.*

205. See OVERVIEW, *supra* note 12. Inmates can receive up to 54 days good time credit per year.

206. See *id.* See also USSG, *supra* note 8, ch. 1, pt. A, ¶ 3.

207. USSG, *supra* note 8, ch. 1, pt. A, ¶ 3.

208. *Id.* ch. 1.

lines increase sentence uniformity.²⁰⁹ A primary goal of the federal sentencing guidelines is to avoid unwarranted sentence disparity by “setting similar penalties for similarly situated offenders.”²¹⁰ The sentencing guidelines were created by studying “10,000 presentence investigations, the differing elements of various crimes as distinguished in substantive criminal statutes, The United States Parole Commission’s guidelines and statistics, and data from other relevant sources. . . .”²¹¹

The sentencing guidelines are encapsulated in a sentencing table.²¹² The horizontal axis of the sentencing table applies to the defendant’s criminal history.²¹³ The horizontal axis lists the six “Criminal History Categories.”²¹⁴ The vertical axis of the table relates to the seriousness of the offense.²¹⁵ The *Federal Sentencing Table*’s vertical axis lists the forty-three “Offense Levels.”²¹⁶ Sentences are determined through the interplay of the horizontal and vertical axis of the sentencing table.²¹⁷ A copy of the *Federal Sentencing Table* is at Appendix A.

Proportionality is the third objective of federal sentencing. Proportionality allows for “appropriately different sentences for criminal conduct of differing severity.”²¹⁸ The Sentencing Commission believes that the sentencing guidelines realize proportionality by combining offense levels, sentence adjustments, and criminal history.²¹⁹

Offense levels relate to the seriousness of the crime. The offense levels range from one to forty-three.²²⁰ An offense level of one corresponds to minor offenses while an offense level of forty-three relates to the most serious offenses.²²¹ Calculation of the offense level starts with determin-

209. *Id.*

210. UNITED STATES SENTENCING COMMISSION, ANNUAL REPORT (1999) [hereinafter REPORT].

211. See USSG, *supra* note 8, ch. 1, pt. A.

212. See *id.* ch. 5, pt. A. See also *infra* Appendix A.

213. FEDERAL PUBLIC AND COMMUNITY DEFENDERS, AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING (Lucien B. Campbell & Henry J. Bemporad eds., 4th ed. 1999) [hereinafter PUBLIC DEFENDERS].

214. See USSG, *supra* note 8, ch. 5, pt. A.

215. PUBLIC DEFENDERS, *supra* note 213.

216. See USSG, *supra* note 7, ch. 5, pt. A.

217. *Id.* ch. 1, pt. A, ¶ 3.

218. *Id.* ch. 1.

219. See OVERVIEW, *supra* note 12.

220. See USSG, *supra* note 8, ch. 1.

221. See PUBLIC DEFENDERS, *supra* note 213. See also USSG, *supra* note 7.

ing the base offense level.²²² Each type of crime has a corresponding base offense level.²²³ For example, all trespasses have a base offense level of four while all kidnappings have a base offense level of twenty-four.²²⁴

Most crimes have specific offense characteristics.²²⁵ These characteristics can work to increase or decrease the base offense level. As an example, robbery has a base offense level of twenty. Robbery also applies specific offense characteristics when a firearm is used in the robbery. For example, if a firearm is discharged during a robbery, a seven level increase is imposed and the offense level is twenty-seven (that is, $20 + 7 = 27$). If a gun is shown but not discharged, a five level increase is in order. The corresponding offense level is increased from twenty to twenty-five.²²⁶

The offense level can also be modified by adjustments.²²⁷ Adjustments are similar to specific offense characteristics in that they can either increase or decrease the offense level.²²⁸ Adjustments are dissimilar to specific offense characteristics in that they may be applicable to any offense. The three types of adjustments are: victim related adjustments, offender's role in the crime adjustments, and obstruction of justice adjustments.²²⁹ A young, aged, physically impaired, or mentally impaired victim may warrant a two level increase.²³⁰ Minimal participation in the crime warrants a four level decrease.²³¹ Obstruction of justice may similarly result in a two level increase.²³²

Adjustment may also apply if the defendant is convicted of multiple counts or accepts responsibility for his acts. An accused convicted of multiple counts may have his offense level increased by up to five levels. The increase depends on the number of additional offenses and the seriousness of those offenses.²³³ If the trial judge believes that the defendant accepts responsibility for his crime, the judge may make a downward adjustment

222. See USSG, *supra* note 8, ch. 1.

223. *Id.*

224. *Id.*

225. See OVERVIEW, *supra* note 12.

226. See USSG, *supra* note 8, ch. 1.

227. See OVERVIEW, *supra* note 12.

228. *Id.*

229. See USSG, *supra* note 8, ch. 3, pt. A, B, & C.

230. See OVERVIEW, *supra* note 12.

231. *Id.*

232. *Id.*

233. See USSG, *supra* note 8, ch. 1, pt. A, ¶ 3. See also USSG, *supra* note 8, app. D.

of two offense levels.²³⁴ The judge may consider “whether the offender truthfully admitted his . . . role in the crime, whether the offender made restitution before there was a guilty verdict, and whether the offender pled guilty.”²³⁵

As opposed to the vertical axis, which relates to offense levels, the horizontal axis defines the six criminal history categories.²³⁶ Criminal history considers the past criminal behavior of the offender and how close in time the current crime is to the past criminal behavior.²³⁷ Category I is the least severe category and is applied primarily to first time offenders.²³⁸ Category VI is the most severe category and applies to criminals with lengthy criminal records.²³⁹

Criminal history is determined by awarding past convictions a numerical score.²⁴⁰ The numerical scores are tallied and a corresponding criminal history category is determined.²⁴¹ Severe crimes and recent crimes rate the highest score.²⁴² For example, if an offender had a sixty day sentence for a prior offense he committed as an adult less than ten years from the date of the current offense, he would receive two points.²⁴³ If the offender committed the current offense while on parole, the offender would receive an additional two points for a total of four points.²⁴⁴ Four points corresponds to a Category III criminal history.²⁴⁵

A sentencing range can be determined from the intersection of the criminal history category and the offense level.²⁴⁶ Once the intersection is determined, simply read the sentencing range displayed in the sentencing matrix.²⁴⁷ The range is given in months.²⁴⁸ The sentencing table excerpt

234. USSG, *supra* note 8, ch. 1, ch. 3, & pt. E.

235. OVERVIEW, *supra* note 12. “Offenders who qualify for the two-level deduction and whose offense levels are greater than 15, may be granted an additional one-level deduction if: (1) they provide complete and timely information about their involvement in their offense, or (2) in a timely manner, they declare their intention to plead guilty.” *Id.*

236. *See* OVERVIEW, *supra* note 12.

237. *See* USSG, *supra* note 8, ch. 4, pt. A.

238. *Id.*

239. *Id.* ch. 4, pt. A & app. D.

240. *Id.*

241. *Id.* ch. 4, pt. A.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* ch. 1 & app. D.

246. *Id.* ch. 4, pt. B.

below illustrates this procedure. (Figure 1). For example, if the offense level was twenty and the criminal history category was IV, the sentence range would be fifty-one to sixty-three months.²⁴⁹

SENTENCING TABLE EXTRACT²⁵⁰
Criminal History Category (Criminal History Points)

| | I | II | III | IV | V | VI |
|---------------|----------|----------|---------|--------------|-----------|--------------|
| OFFENSE LEVEL | (0 or 1) | (2 or 3) | (4,5,6) | (7,8,9) | 10,11,12) | (13 or more) |
| 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |

FIGURE 1

Under rare circumstances, the trial judge may depart from the guidelines.²⁵¹ The judge may depart from the guidelines if he believes there are issues in the sentencing case that the guidelines did not adequately consider.²⁵² If the departure increases the sentence above the guideline cap, the offender may appeal.²⁵³ If the departure lessens the sentence, the government may appeal.²⁵⁴ The trial judge must state the reason for departure on the record.²⁵⁵

247. *Id.*

248. *Id.*

249. *Id.*

250. USSG, *supra* note 8.

251. 18 U.S.C. § 3553(b) (2000). A court may depart if it finds “an aggravation or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” *Id.* See USSG, *supra* note 8, ch. 1, pt. A. “[T]he Commission believes that despite the courts’ legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission’s data indicate made a significant difference in pre-guidelines sentencing practice.” *Id.*

252. USSG, *supra* note 8, ch. 1, pt. A.

253. OVERVIEW, *supra* note 12.

254. *Id.*

255. *Id.*

The preceding two sections provided an overview of military and federal sentencing procedures. This overview demonstrates that while the sentencing goals of both systems are similar,²⁵⁶ the methods employed to achieve those goals are dissimilar.²⁵⁷ Before adopting the federal sentencing guidelines, the federal system allowed trial judges almost unfettered sentencing discretion.²⁵⁸ Such unfettered discretion, while no longer enjoyed by federal judges, is exercised by today's military sentencing authorities.²⁵⁹

IV. Sentence Disparity in the Military

Before adopting federal sentencing guidelines, the federal system suffered from unwarranted sentence disparity.²⁶⁰ The pre-guidelines system used judicial sentencing discretion to fashion individual sentences.²⁶¹ The Sentencing Commission replaced judicial sentencing discretion and individual sentencing with sentencing guidelines and sentence uniformity.²⁶²

Congress enacted federal sentencing guidelines, in large part, to decrease unwarranted sentence disparity.²⁶³ This section explores the degree of sentence disparity within the military justice system. This step is important because if an unwarranted amount of sentence disparity exists within the military, sentencing guidelines may be necessary to decrease military sentence disparity.

Sentence disparity is illustrated by comparing data collected from the Army, Navy, Air Force, and Marine Corps. The data is formulated to calculate the sentencing range, mean (arithmetical average), and standard deviation for various punitive articles. These statistics are calculated for both the services as a whole and each individual service. This section will

256. Compare 18 U.S.C. § 3553; 28 U.S.C. § 991 (2000), with BENCHBOOK, *supra* note 18, at 64. The goals of sentencing in the federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

257. See discussion *supra* Sections II and III.

258. Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1775, 1757 (1992).

259. See discussion *supra* Section II.

260. Freed, *supra* note 163, at 1688-91.

261. Stith & Carbanes, *supra* note 137, at 1251-53; Hoelter et al., *supra* note 141.

262. USSG, *supra* note 8, ch. 1, pt. A. See OVERVIEW, *supra* note 12.

263. Witten, *supra* note 162, at 697.

show, based on the data described above, that the military suffers from a high degree of sentence disparity.

A. Military Sentencing Data

Representatives for the Army, Navy-Marine Corps, and Air Force provided raw data regarding the sentences awarded at all general courts-martial during the previous year.²⁶⁴ The data was tallied to discover the degree of sentencing disparity that exists within the armed forces.²⁶⁵ The primary calculations performed were the mean, range, and standard deviation. For the purposes of this article, the most important calculation is the standard deviation.

264. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

265. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6. The data collected from the four services illustrated that it is a rare occurrence when an accused is convicted of a single punitive article. It is much more common for an accused to be convicted of several violations, even if all of these violations arise from a single act. For example, an accused might be charged with illegal drug use and unauthorized absence when the accused attempts to avoid a drug test. Alternatively, an accused might be charged with rape and an orders violation for being in the barracks room of the victim after posted hours. This dilemma (i.e., one adjudged sentence applying to multiple punitive articles) mandates that confinement be discounted to take into consideration when an accused is convicted of several punitive articles.

The formula employed first divided the punitive articles into three categories: major, moderate, and minor crimes. Major crimes are articles 100, 104, 106, 106a, 110, 114, 118, 119, 120, 121, 122, 124, 125, 126, 128, 129, 130, and 133. Moderate crimes are articles 85, 90, 94, 99, 101, 102, 105, 108, 109, 112(a), 113, 116, 123, and 123(a) and 134. Minor crimes are articles 83, 84, 86, 87, 88, 89, 91, 92, 93, 95, 96, 97, 98, 103, 107, 111, 112, 115, 117, 131, and 132. If the accused was found guilty of two or more major crimes, the confinement was evenly divided between the major punitive articles. If the accused was found guilty of three or more major crimes 33% of the sentence would be assigned to each article. One minor crime decreased the sentence by 10%, two minor crimes decreased the sentence by 15%, three or more minor crimes resulted in a 20% decrease. If two punitive articles covered the same basic criminal act (i.e., 108 and 121, or 120 and 125), 90% of the sentence would be assigned to each article. A major crime combined with a moderate crime would employ the following discount: one moderate crime would reduce the sentence 15% while two or moderate crimes would reduce the sentence by 25%. Conviction of three or more moderate crimes would reduce the sentence by 33%. If the accused is convicted of only multiple moderate crimes, the sentence is equally distributed amongst the various moderate crimes.

While the Federal Sentencing Commission employs an entire staff to study sentencing data and calculate statistical information, the author did not enjoy that luxury. The data

The standard deviation is the square root of the population variances.²⁶⁶ The standard deviation is an important calculation because it illustrates the degree of sentence disparity that exists within a population.²⁶⁷ A large standard deviation indicates a high degree of sentence disparity within that population.²⁶⁸ In other words, the standard deviation illustrates how closely each individual sentence is to the mean sentence. The closer each individual sentence is to the mean sentence, the lower the standard deviation. A low standard deviation equates to a high degree of sentence uniformity because individual sentences are closer to the mean sentence. Alternately, the more each individual sentence varies from the mean sentence, the higher the standard deviation. As the standard deviation increases, sentence disparity increases because individual sentences are further from the mean sentence.

The first calculation performed determined the overall mean confinement, adjudged by general courts-martial, for the four branches of service. The mean confinement adjudged by the Army was thirty-five months.²⁶⁹

265. (continued) is accurate and the discounting formula was applied uniformly throughout the analysis. The author is aware that different discounting methods could be employed and that some might have an advantage over the one used here. While the discounting method might be improved by brighter minds, the results provided are accurate and significant to illustrate the main point of this section, namely, that various punitive articles suffer from a high population standard deviation and that this high population standard deviation is evidence of unwarranted sentence discrepancy.

266. ENCARTA, *supra* note 23. See ROBERT D. MASON, *STATISTICAL TECHNIQUES IN BUSINESS AND ECONOMICS* (6th ed. 1986).

267. See ENCARTA, *supra* note 23. See also Theresa Walker Karle & Thomas Sager, *Article: Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 EMORY L.J. 393 (1991). This article compared pre-guideline federal sentences to post-guideline federal sentences. The statistic used to compare sentences was the standard deviation (s/d). It is interesting to note the following pre-guideline s/d to determine what the federal system saw as significant sentence disparity. Marijuana distribution had a s/d of 54 months, cocaine distribution had a s/d of 104 months, robbery had a s/d of 128 months and larceny had a s/d 43 months. See also MASON, *supra* note 266.

268. See ENCARTA, *supra* note 23. As an example, if you wanted to compare the confinement awarded to two separate populations, one population consisting of four Marines and one population consisting of four soldiers, you could calculate the population standard deviation. If the sentences awarded the four Marines in months were 12, 11, 13, and 12, the average would be 12 and the population standard deviation would be .8. This low value of standard deviation indicates a low degree of sentence disparity. If the sentence of the four soldiers was 24, 4, 14, and 6, the average would be 12 but the standard deviation would be 7.9. The value for the population standard deviation is higher for the Soldiers than the Marines because the sentences for the soldiers have a higher degree of sentence discrepancy.

269. Army Data, *supra* note 7.

The mean confinement imposed by the Navy was thirty-four months.²⁷⁰ The mean length of confinement awarded by the Air Force was twenty-two months²⁷¹ while the Marine Corps adjudged mean confinement of forty-eight months.²⁷² The combined mean confinement for the four services was thirty-three months.²⁷³

The next calculation performed was the standard deviation for all sentences awarded at general courts-martial during the previous year. The confinement standard deviation for the four services was eighty-one months.²⁷⁴ The standard deviation for the Army was ninety-six months²⁷⁵ as compared to fifty-two months for the Navy.²⁷⁶ The standard deviation for the Air Force was fifty-six months²⁷⁷ while the Marine Corps had a standard deviation of eighty months.²⁷⁸

The high standard deviation calculated above is some evidence that an unwarranted amount of sentence disparity exists both within and between the services. It is some evidence because sentences varied, on average, eighty-one months from the mean sentence. The evidence is, at best, a general indicator because the calculations were performed without accounting for the differences between sentences for different punitive articles.

What the above data does illustrate is that the four branches of service had individual population standard deviations of between fifty-two months (Navy) and ninety-six months (Army).²⁷⁹ If the four branches prosecuted a similar proportion of punitive articles (that is, twenty percent of the cases were Article 112a, ten percent were Article 121, and the like) then this value would provide some evidence that the Army had more sentence disparity than the Navy.²⁸⁰

270. USMC/USN Data, *supra* note 123.

271. Air Force Data, *supra* note 6.

272. USN/USMC Data, *supra* note 123.

273. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

274. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

275. Army Data, *supra* note 7.

276. USN/USMC Data *supra* note 123.

277. Air Force Data, *supra* note 6.

278. USN/USMC Data *supra* note 123.

279. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

280. See ENCARTA, *supra* note 23. See also example accompanying *supra* note 268.

The more valuable calculation is determining the standard deviation for particular punitive articles. As previously discussed, if the punitive articles have an accompanying high standard deviation then that high standard deviation supports a conclusion of significant sentencing disparity.²⁸¹ The next subsection will explore the standard deviation and mean sentences that attach to various punitive articles.

B. Sentencing Data Relating to Specific Punitive Articles

This subsection calculates the standard deviation that attaches to rape, murder, and illegal drug distribution. If these articles have a high corresponding standard deviation, this deviation is evidence of sentence disparity. While this subsection discusses three punitive articles, similar calculations were completed for each punitive article contained in Appendix B.

This article proposes that if the standard deviation for a particular punitive article is more than fifty percent of the value of the mean sentence, then that high standard deviation is strong evidence that unwarranted sentence disparity exists for that punitive article. A standard deviation that is more than fifty percent of the mean sentence indicates that individual sentences deviate so greatly from their mean that it can be concluded that sentence uniformity is lacking.²⁸² For example, if a punitive article had a mean sentence of forty months and a standard deviation of twenty months, this paper would conclude that since the standard deviation is fifty percent

281. See ENCARTA, *supra* note 23. See also Paul J. Hofer et al., *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 CRIM. L. & CRIMINOLOGY 239 (1999), Paul J. Hofer & Kevin R. Blackwell, *Searching for Discrimination in Federal Sentencing* (2000) (unpublished). Mr. Hofer is a Senior Research associate for the U.S. Sentencing commission. The articles discuss the common approach of using multiple regression analysis as a means of studying unwarranted sentence disparity. Multiple regression has the theoretical advantage of allowing various factors to be controlled, thus; arguably allowing a more accurate measure of the variables that may create unwarranted sentence disparity. The two articles argue that the use of multiple regression to study sentencing guidelines is flawed because of methodological obstacles, disagreement as to which factors are legally relevant, and the “human” factor applied to each case by the sentencing judge. Multiple regression was not used in this paper for the reasons stated above. Additionally, multiple regression was not used because of a lack of assets by the author and, more importantly, the combination of case study, as outlined in Part I, and the calculations conducted in this section satisfactorily illustrate the point that unwarranted sentence disparity exists in the military.

282. See William Rhodes, *Criminology: Federal Criminal Sentencing: Some Measurement Issues With Application To Pre-Guideline Sentencing Disparity*, 81 CRIM. L.-

of the mean sentence (that is, twenty months is fifty percent of forty months) that unwarranted sentence disparity exists for that punitive article.

The first example is Article 120, rape, which has a sentencing range between 3 months and 324 months.²⁸³ The mean for all four services was 101 months with a corresponding population standard deviation of 155 months.²⁸⁴ The mean confinement for the Army was 101 months²⁸⁵ while the Navy had an mean of 73 months.²⁸⁶ The Air Force adjudged mean confinement of 79 months²⁸⁷ while the mean in the Marine Corps was 55 months.

The overall population standard deviation for the crime of rape was 155 months. The service standard deviations broke down as follows: Army 222 months,²⁸⁸ Navy 80 months,²⁸⁹ Air Force 114 months,²⁹⁰ Marine Corps 42 months.²⁹¹ Because each standard deviation exceeds the mean sentence by more than fifty percent, under the criteria established by this article, it can be concluded that the crime of rape suffers from unwarranted sentence disparity.

Some may argue that convictions for Article 120 include date rape,²⁹² thereby inflating the standard deviation. The data does not support this criticism. If sentences of 24 months or less are eliminated from the equation, the overall population standard deviation increases to 196 months.²⁹³

282. (continued) & CRIMINOLOGY 1002, 1007-08 (1991). Prior to sentencing guidelines, the federal crime of bank robbery had a guilty plea mean of 132.59 and a standard deviation of 95.47. Convictions where the individual was found guilty counter to his plea resulted in a mean sentence of 221.4 months and a standard deviation of 139.23 months. In both cases, the standard deviation was more than 50% of the mean sentence.

283. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

284. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

285. Army Data, *supra* note 7.

286. USN/USMC Data, *supra* note 123.

287. Air Force Data, *supra* note 6.

288. Army Data, *supra* note 7.

289. USN/USMC Data, *supra* note 123.

290. Air Force Data, *supra* note 6.

291. USN/USMC Data, *supra* note 123.

292. Date rape is defined as a rape where the perpetrator knows the victim. A date rape may receive a more lenient sentence because the issue of consent, or withdrawing consent, may be seen as a mitigating factor by the sentencing authority.

293. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

The individual service standard deviations have the same result. For example, when you discard sentences of 24 months or less, the standard deviation in the Army increases to 239 months.²⁹⁴ These large population standard deviations are strong evidence that a high degree of sentencing disparity exists in the military for the crime of rape.²⁹⁵

The next crime to consider is Article 118, murder.²⁹⁶ Murder also has a high population standard deviation. The mean sentence for violations under Article 118, not including those that have life as a mandatory sentence, is 283 months.²⁹⁷ The sentencing range is 61 to 547 months.²⁹⁸ The population standard deviation is 172 months.²⁹⁹ If you eliminate sentences of 15 years or less from the equation, the standard deviation is 144 months.³⁰⁰ Thus, even when you remove relatively lenient sentences from the equation, the standard deviation for confinement remains significant.³⁰¹ Because the standard deviation exceeded fifty percent of the mean, it may be concluded that murder suffers from unwarranted sentence disparity.

The final punitive article addressed in this section is Article 112a(3), wrongful distribution of a controlled substance.³⁰² The confinement range for the four branches was 1 to 180 months.³⁰³ The mean confinement adjudged by all four services was twenty-nine months.³⁰⁴ The confinement deviated from the mean by an average of thirty-one months.³⁰⁵

The Marine Corps had the highest degree of internal sentence disparity. The standard deviation in the Marine Corps for wrongful drug distribution was fifty-six months while the mean sentence was sixty-five

294. Army Data, *supra* note 7.

295. See ENCARTA, *supra* note 23. See also example accompanying *supra* note 268.

296. MCM, *supra* note 16, pt. IV, ¶ 43.

297. Army Data, *supra* note 7.

298. *Id.*

299. *Id.*

300. *Id.*; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

301. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6. See also Karle & Sager, *supra* note 267, at 406-08.

302. MCM, *supra* note 16, pt. IV, ¶ 37b(3).

303. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data, *supra* note 6.

304. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

305. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

months.³⁰⁶ The Air Force had a standard deviation of twenty-one months and a mean sentence of nineteen months; the Army had a standard deviation of twenty months and a mean sentence of twenty-seven months while the Navy had a standard deviation of ten months and a mean sentence of thirty months.³⁰⁷

The overall standard deviation for wrongful drug distribution, and the individual standard deviations for all of the branches, except for the Navy, are significant. The sentences deviated by more than fifty percent of the mean sentence. This is evidence that Article 112a(3) suffers from significant sentence disparity.

The large population standard deviations detailed in each example above provide evidence that sentence disparity exists within the military justice system. The next section contrasts how the military sentencing system all but ignores sentence uniformity while the federal sentencing system promotes sentence uniformity.

C. Military Sentencing versus Federal Sentencing: Two Divergent Views of Sentence Uniformity

The military justice system largely abandoned sentence uniformity as a sentencing goal in the 1950s.³⁰⁸ Abandoning sentencing uniformity is one factor that led to the sentencing disparities that exist within the military today.³⁰⁹ Other factors that likely increased sentencing disparity include;

306. USN/USMC Data, *supra* note 123.

307. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

308. *See* United States v. Dowling, 18 C.M.R. 670 (C.M.A. 1954). *See also* United States v. Mamaluy, 27 C.M.R. 176 (C.M.A. 1959); discussion *supra* Section II.

309. *See Mamaluy*, 27 C.M.R. at 176; *see also* United States v. Lacy, 50 M.J. 286 (1999). When the military system removed sentence uniformity from the *Manual for Courts-Martial*, the military system chose to rely upon the appellate court to ensure sentence uniformity. The appellate courts review a sentence on uniformity grounds only if the cases are closely related and highly similar. The standard of review is abuse of discretion or preventing an obvious miscarriage of justice. The end result is that the appellate courts review very few cases on sentence uniformity issues. Since the appellate courts review very few cases on sentence uniformity grounds, and when they do review a case the standard of review is very high, the vast majority of sentences are left intact. Since the wide range of sentences adjudged remain in force, they lend themselves to sentence disparity. *See also supra* notes 6, 7, and 123.

the wide discretion given the sentencing authority,³¹⁰ the option of being sentenced by a military judge or military members,³¹¹ and the sentencing goal of maintaining “good order and discipline.”³¹²

Unlike the military system, the federal system found sentence disparity to be counter to the goals of federal sentencing.³¹³ Promoting sentence uniformity is a critical part of the federal criminal justice system.³¹⁴ Unwarranted sentence disparity was a major reason for the creation and adoption of federal sentencing guidelines.³¹⁵

The current version of the *Manual for Courts-Martial* states that “[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment. . . .”³¹⁶ The *Manual for Courts-Martial* does not provide any definitions of what is meant by “promoting justice,” “maintaining good order and discipline,” or promoting “efficiency and effectiveness” in the military.³¹⁷ The *Manual* gives the sentencing authority sole discretion to fashion a sentence that fulfills the purposes of military law.³¹⁸ The only meaningful instruction the sentenc-

310. MCM, *supra* note 16, R.C.M. 1002.

311. *Id.* R.C.M. 903. *See also* discussion *supra* Section II.

312. MCM, *supra* note 16, pt. I, ¶ 3.

313. 28 U.S.C. § 991(b) (2000).

314. *Id.*; USSG, *supra* note 8, ch. 1 pt. A.

315. 28 U.S.C. § 991(b); USSG, *supra* note 8, ch. 1 pt. A.

316. MCM, *supra* note 16, pt. I, ¶ 4.

317. *Id.*

318. Compare MCM, *supra* note 16, R.C.M. 1002 with BENCHBOOK, *supra* note 18, at 64. It is interesting that the *Benchbook* never refers to the purposes of military justice. The *Benchbook* instead tells the members:

There are several matters which you should consider in determining an appropriate sentence. You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of [his] crime(s) and [his] sentence from committing the same or similar offense. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.

Id.

See 18 U.S.C. § 3553(a)(2) (2000) (listing the federal sentencing goals as just punishment, deterrence, incapacitation, rehabilitation).

ing authority receives is that they may consider the sentencing goals of rehabilitation, punishment, deterrence, protection of society, and preservation of good order and discipline when fashioning a sentence.³¹⁹

While the sentencing authority receives instruction that they may consider rehabilitation, punishment, deterrence, and protection of society when fashioning a sentence, neither the *Manual for Courts-Martial* nor the *Judges' Benchbook* provides any concrete guidance on how the sentencing goals are to be applied in order to fulfill the purposes of military law.³²⁰ In the end, the military judge informs the members that they can do whatever they want when fashioning a sentence as long as they do not exceed the maximum sentence authorized by law for that court-martial.³²¹

Unlike the vague direction provided to the sentencing authority in the military, the *Federal Sentencing Guidelines Manual* provides detailed guidance on how to sentence a criminal.³²² The cornerstone of this guidance is the federal sentencing guidelines.³²³ A primary goal of the federal sentencing guidelines is uniformity.³²⁴ Sentence uniformity seeks to set similar "penalties for similarly situated offenders."³²⁵ Thus, in the federal system, sentence uniformity is achieved through the use of sentencing guidelines.³²⁶

The above demonstrates that the military and federal sentencing systems pursue almost identical sentencing goals.³²⁷ While the goals are similar, the method for achieving those goals is very different. The military allows the sentencing authority great discretion and does not actively pursue sentence uniformity. The federal system strongly curtails sentence discretion with sentencing guidelines, while embracing sentence uniformity as the means by which it satisfies the federal sentencing goals.

319. BENCHBOOK, *supra* note 18, at 64.

320. MCM, *supra* note 16, R.C.M. 1001-1010; BENCHBOOK, *supra* note 18, at 64.

321. BENCHBOOK, *supra* note 18, at 64. "The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion." *Id.*

322. USSG, *supra* note 8.

323. 18 U.S.C.S. §§ 3551-3553, 3557-3559 (2000); 28 U.S.C. § 991 (2000); USSG, *supra* note 8.

324. 18 U.S.C.S. §§ 3551-53, 3557-59; 28 U.S.C. § 991; USSG, *supra* note 8.

325. USSG, *supra* note 8, ch. 1.

326. 28 U.S.C. § 991; USSG, *supra* note 8.

327. Compare 18 U.S.C. § 3553; 28 U.S.C. § 991, with BENCHBOOK, *supra* note 18, at 64. The goals of sentencing in the federal system are: just punishment, deterrence, incapacitation, and rehabilitation. The military justice system employs the same four goals plus the goal of discipline.

D. Is Sentence Disparity Ever Justified?

The data discussed earlier demonstrated that sentencing disparity exists within the military.³²⁸ The preceding subsection also illustrates that the military and the federal system take divergent approaches to the issue of sentence uniformity. The next issue to be addressed is whether sentencing disparity equates to “injustice.” Put differently, does a high degree of sentencing disparity equal a failure of the military to fulfill the purposes of military law?³²⁹

As discussed earlier, the purposes of military law are to promote justice, assist in maintaining good order and discipline, and increase the efficiency and effectiveness of the military.³³⁰ This subsection suggests that these purposes necessitate that the military retain the ability to sentence in a disparate fashion when the purposes of military law warrant.

Proponents of the current military sentencing regime may argue that sentence disparity exists because of the military’s focus on the individual accused.³³¹ The current system allows the sentencing authority to fashion a sentence that focuses on the crime committed by the accused, the impact of the crime on good order and discipline, and on the circumstances surrounding the accused.³³² For example, an aircraft mechanic who uses illegal drugs may receive a sentence that is more severe than the sentence received by an administrative clerk who uses the same drug. The primary, and perhaps only reason for this disparity would be the job of the accused. The commander of the aircraft mechanic could argue that a mechanic who uses illegal drugs is a major threat to good order and discipline within his unit. Mechanics who use illegal drugs may cause pilots to lose confidence in the maintenance of their aircraft. Similarly, mechanics under the influence may make errors that result in the loss of life and machine. This loss would decrease the effectiveness of the unit.

The commanding officer of the administrative clerk would not face the same threat to good order and discipline as that faced by the com-

328. See Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6. See also discussion *supra* Section IV.

329. MCM, *supra* note 16, pt. I, ¶ 4. The purposes of military justice are to promote justice, assist in maintaining good order and discipline, and to increase the efficiency and effectiveness of the military.

330. *Id.*

331. *Id.* R.C.M. 1002.

332. *Id.* R.C.M. 1001.

mander of the flight mechanic. The potential consequences of a clerk working under the influence of narcotics are less severe than those posed by the mechanic. Accordingly, the purposes of maintaining good order and discipline and effectiveness of the service may, at times, justify disparate sentences.³³³

Similarly, the type of command and duty station of an individual may be a reason for sentence disparity. A training command may have different military justice needs than an operational command. The military justice needs of an operational command may vary depending on whether they are in garrison or in the field. Like the illegal drug use example, sentence disparity is more likely to be warranted when the impact of the crime depends on the type of command to which the accused belongs.

When the victim of a crime is the military, a larger degree of sentence disparity may be warranted. A larger degree of sentence disparity is justified because of differing needs or missions of various commands. For example, good order and discipline may warrant that a Marine platoon sergeant, convicted of being disrespectful to his platoon commander in front of his platoon, receive more confinement than a Marine private who commits a similar offense. The disparity in sentence is warranted because of the increased impact that the platoon sergeant's misconduct has on good order and discipline within that unit.³³⁴

Sentence disparity is less warranted when the crime does not relate to good order and discipline or to the effectiveness of the military. For example, an aircraft mechanic convicted of raping a woman should receive a similar sentence as an administrative clerk who commits a similar rape. Other military concerns, such as national security, efficiency and effectiveness of the service, good order and discipline, and the promotion of justice, do not justify two similar rapists receiving disparate sentences.³³⁵

To be effective, military sentencing guidelines must allow courts-martial to adjudge disparate sentences when either good order and discipline or military efficiency warrant. The proposed sentencing guidelines attempt to accomplish this task through the use of sentencing categories.

333. *Id.* pt. I, ¶ 3.

334. A platoon sergeant is the link between the platoon commander and his Marines. The platoon commander must rely upon the platoon sergeant to carry out his orders. If the platoon sergeant is disrespectful in front of the platoon, his misconduct is more severe than that of the private because of the leadership role of the platoon sergeant.

335. MCM, *supra* note 16, pt. I, ¶ 3.

The proposed sentencing guidelines will be discussed in detail in the next section of this article.³³⁶

V. Adopting Military Sentencing Guidelines

Sentencing guidelines can improve military sentencing by increasing sentence uniformity while simultaneously satisfying the purposes of military sentencing.³³⁷ Adopting military sentencing guidelines would also bring the military sentencing system in line with the federal system and a majority of the state criminal justice systems.³³⁸

This section proposes a unique form of military sentencing guidelines. The first subsection will contend that for military sentencing guidelines to be effective, the proposed guidelines should retain the positive aspects of the current sentencing system. The second subsection provides a systematic discussion of how the military sentencing matrix is created. The final subsection argues that only the convening authority would be allowed to depart from the sentencing guidelines.

A. Developing Military Sentencing Guidelines

For sentencing guidelines to be effective, they must result in a system that is superior to the one that currently exists. The primary benefit of sentencing guidelines is sentence uniformity.³³⁹ The price of sentence uniformity should not be the many positive aspects of the current system. Any proposed system must incorporate the strengths of the present system with the benefits of guidelines. Strengths that must be preserved are confidence

336. See discussion *infra* Section V.B.

337. MCM, *supra* note 16, pt. I, ¶ 3.

338. See 10 U.S.C. § 836 (2000). See also Lanni, *supra* note 13, at n.14. The federal system as well as the states of Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin currently employ a form of sentencing guidelines for criminal offenses.

339. See USSG, *supra* note 8, ch. 1, pt. A, ¶ 3. See also Ilene H. Nagel & Stephen J. Schulhofer, *Symposium on Federal Sentencing: Article: A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under The Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 503 (1992). One of the three congressional objectives of sentencing guidelines is to increase sentence uniformity.

in the system by the military community, efficiency, and use of the adversarial process in sentencing.

The active duty military community has confidence in the current military sentencing system. A Department of Defense survey revealed that when service members were asked whether the military community or the civilian community was better at ensuring the fair administration of justice, twenty-eight percent said the military was better, sixteen percent said the civilians were better, and fifty-four percent said that there was no difference.³⁴⁰

The second strength of the current military sentencing system is efficiency. The military justice system does not use probation officers.³⁴¹ Most sentencing cases consume less than four hours of court time.³⁴² Additionally, the accused is not constrained by the Military Rules of Evidence in presenting his sentencing case.³⁴³

Closely related to efficiency is the military's use of the adversarial sentencing process.³⁴⁴ The military employs the adversarial system instead of probation officers and their attendant presentencing reports.³⁴⁵ The adversarial process provides the same type of information as the federal presentencing report, but provides that information within the protections of the adversarial process.³⁴⁶

Through an adversarial process, the parties are able to present their sentencing case.³⁴⁷ The military system allows the accused to present a wide range of sentencing evidence and attack the evidence presented by the trial counsel. The military system puts the defendant in control of the evidence that he offers.

340. ARMED FORCES EQUAL OPPORTUNITY SURVEY, DMDC REPORT NO. 97-027 (Aug. 1999).

341. MCM, *supra* note 16.

342. Interview with Lieutenant Colonel S. Folsom, Military Judge, Sierra Circuit, at Camp Pendleton, Ca. (July 20, 2000); Interview with Major M. Sitler, Vice Chair, Criminal Law Department, at The Judge Advocate General's School, Charlottesville, Va. (Apr. 7, 2000).

343. MCM, *supra* note 16, R.C.M. 1001.

344. *Id.* See discussion *supra* Section II.

345. MCM, *supra* note 16, R.C.M. 1001 analysis, app. 21.

346. *Id.*

347. *Id.* R.C.M. 1001.

Considering the above, if the military is to incorporate sentencing guidelines, the guidelines should be designed to retain the strengths of the current system. The proposed sentencing guidelines seek to preserve confidence in the military justice system, the efficiency of the sentencing system, and the adversarial process. The positives of the current system are preserved in several ways.

First, the proposed military sentencing guidelines have limited application. The proposed guidelines would only affect the confinement adjudged at general courts-martial. The sentencing guidelines would not apply to either summary or special courts-martial.³⁴⁸ The guidelines are not necessary for special courts-martial³⁴⁹ because the maximum punishments currently authorized at special courts-martial are relatively narrow (that is, the maximum punishment allowed is six months of confinement,³⁵⁰ forfeiture of two-thirds pay per month for six months, a fine, and a bad conduct discharge).³⁵¹ The narrow sentencing range ensures that special courts-martial will always have a low standard deviation and that the sentences will be sufficiently uniform.³⁵²

Second, special courts-martial outnumber general courts-martial by a ratio of more than 3 to 2.³⁵³ Therefore, retaining the current special court-martial system would preserve the bulk of the present military sentencing system. Additionally, maintaining the present special courts-martial system would ease the burden

348. *Id.* R.C.M. 204.

349. *Id.* Sentencing guidelines would not apply to summary courts-martial for the same reason. The maximum confinement allowed at a summary court-martial is one month.

350. Congress has recently authorized the increase of confinement from six months to twelve months. The President has yet to implement this change.

351. MCM, *supra* note 16, R.C.M. 201(f)(2)(B).

352. *Id.* The maximum confinement disparity that can exist between two individuals convicted by a special courts-martial is six months.

353. ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED SERVICES OF THE UNITED STATES SENATE AND THE UNITED STATES SENATE AND THE SECRETARY OF DEFENSE, SECRETARY OF TRANSPORTATION, AND SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FOR THE PERIOD OCTOBER 1, 1997 TO SEPTEMBER 30, 1998. (Summary courts-martial are excluded for this comparison.) Comparing special courts-martial to general courts-martial. During fiscal year 1998 the Army, Navy, Air Force, and Marine Corps held 1597 general courts-martial and 2613 special courts-martial.

354. Adopting military sentencing guidelines would be a revolutionary change to the military sentencing system. To reduce the potential turmoil that may surround the adoption

the military justice system would face in incorporating the proposed military sentencing guidelines.³⁵⁴

354. (continued) of the proposed military sentencing guidelines, the proposed guidelines seek to impact a minority of all courts-martial.

Third, the proposed military sentencing guidelines would only affect confinement. Military sentencing guidelines would not influence punitive discharges, fines, reductions or dismissals, or forfeitures of pay and allowances.³⁵⁵ These forms of punishment would be applied as detailed by the current *Manual for Courts-Martial*.³⁵⁶

The next section introduces the proposed military sentencing guidelines and explains how the military sentencing guideline matrix (Appendix B) was created. Further, the section discusses the application of the guidelines to the military.

B. Proposed Military Sentencing Guidelines Matrix

Sentencing guidelines could be implemented through the use of a sentencing matrix, as shown at Appendix B. The matrix consists of a vertical and a horizontal axis. The vertical axis lists the punitive articles.³⁵⁷ The horizontal axis contains the five categories that allow the sentencing authority to weigh extenuation, mitigating, and aggravating factors.³⁵⁸

1. The Vertical Axis of the Military Sentencing Matrix

The vertical axis lists the punitive articles. When appropriate, the punitive articles are divided into classifications. The classifications relate to the various sentencing subdivisions within many of the punitive articles.³⁵⁹ For example, the *Manual* divides Article 119, manslaughter, into two classifications, voluntary manslaughter and involuntary manslaughter. This division is illustrated in Figure 2 below.

355. MCM, *supra* note 16, R.C.M. 1003.

356. *Id.* R.C.M. 1003; 10 U.S.C. §§ 856a, 858b (2000).

357. MCM, *supra* note 16, pt. IV, ¶¶ 1-113.

358. *See* discussion *infra* Section V.B.2

359. MCM, *supra* note 16, pt. IV, ¶¶ 1-113. For example, Article 119 is divided into two classifications, voluntary manslaughter and involuntary manslaughter. Each classification has a unique maximum sentence.

| | Category I | Category II | Category III | Category IV | Category V |
|-----------------|------------|-------------|--------------|-------------|------------|
| Art. 119 | | | | | |
| Class. 1 | 0-48 | 48-56 | 57-71 | 72-83 | 84-180 |
| Class. 2 | 0-12 | 13-20 | 21-40 | 41-72 | 73-120 |

FIGURE 2

2. The Horizontal Axis of the Military Sentencing Matrix

The horizontal axis is comprised of five categories. Category I is the least severe category and offers the most lenient confinement options. Category V is the most severe category and offers the most stringent confinement options. The horizontal axis is also depicted in Figure 2.

The sentencing matrix categories are configured to maximize sentence uniformity while considering the need to increase or decrease confinement as aggravation, extenuation, and mitigation warrant.³⁶⁰ The sentencing categories also allow, when warranted, disparate sentences. For instance, the sentencing categories allow the flight mechanic who uses illegal drugs on the job to be sentenced more severely than the administrative clerk who commits the same crime.

The military judge, upon hearing all aggravation, extenuation, and mitigation evidence, applies his knowledge and experience to the case and assigns the appropriate sentencing category. The members then determine confinement based on the sentencing range contained in the sentencing matrix.³⁶¹ The members do not need special knowledge or training to accomplish this task. Under the proposed military guidelines, the members do not have to concern themselves with the sentences awarded in other cases because the sentencing categories reflect this information.

360. *Id.* R.C.M. 1003, pt. I, ¶ 3. The purposes of military justice necessitate the option of adjudging disparate sentences in certain situations.

361. *See infra* note 377. If the sentencing authority, be they members or judge, believes that the sentencing matrix results in confinement that is too harsh, they may state so on the record and recommend that the convening authority reduce confinement via his clemency powers.

The judge will assign the sentencing category regardless of the forum selected.³⁶² Judges have the necessary training and experience to uniformly assign sentencing categories.³⁶³ Because of the training and experience of military judges, they are uniquely qualified to ensure that the sentencing categories are evenly applied.³⁶⁴

The horizontal axis of the proposed military sentencing matrix increases sentence uniformity in two ways. First, the judge always determines the sentencing category.³⁶⁵ Second, the use of sentencing categories increases sentence uniformity by assigning similar offenders similar ranges of confinement.

Having military judges assign sentencing categories overcomes the criticism raised by *Mamaluy*.³⁶⁶ As discussed earlier, the court in *Mamaluy* recommended that sentence uniformity be removed as a sentencing goal from the *Manual for Courts-Martial*.³⁶⁷ The court made this recommendation because they did not believe that military members had the requisite knowledge and information necessary to apply the sentence uniformity instruction to an individual case.³⁶⁸ While the *Mamaluy* court conceded that sentence uniformity was an appropriate sentencing goal,³⁶⁹ the court, nonetheless, determined that sentence uniformity was not practical

362. MCM, *supra* note 16, R.C.M. 903. An enlisted accused may be tried by officer members, officer members with enlisted representation (i.e., at least one third enlisted members), or by a military judge with the judge's permission. An officer accused may only be sentenced by officer members or a military judge.

363. Lovejoy, *supra* note 40, at n.180, n.187. Major Lovejoy conducted a survey of convening authorities, military judges, trial and defense counsel, and military inmates serving a sentence at Fort Leavenworth. His data supports the proposition that judges sentence in a more uniform manner than do military members.

364. *Id.*; Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 22-23.

365. *See* Morris, *supra* note 364, at 22-23. "Trial by judge alone is viewed as reducing the risk of extreme sentences, while a panel generally is thought to carry a higher chance of acquittal but much less predictability on sentencing." *Id.* *See also* Lovejoy, *supra* note 40, at 6, nn.167, 180, & 187. Major Lovejoy conducted a survey of convening authorities, military judges, trial and defense counsel, and military inmates serving a sentence at Fort Leavenworth. His data illustrates, at least the perception, that judges are less likely to sentence in a disparate fashion.

366. *See supra* notes 51-59 and accompanying text.

367. *United States v. Mamaluy*, 27 C.M.R. 176, 181 (C.M.A. 1959).

368. *Id.* at 181-82.

369. *Id.* at 182.

for the military system.³⁷⁰ The lack of sentencing uniformity that exists in the military today supports the conclusion of the 1959 *Mamaluy* court.³⁷¹

The concerns raised in *Mamaluy* can be avoided through the proposed military sentencing guidelines. The confinement ranges listed on the military sentencing matrix are based on sentencing data. Once the data is studied, appropriate confinement ranges are determined for each category and each punitive article. These confinement ranges work to enhance sentence uniformity.

Critics may argue that using the military judge to determine sentencing categories is an excessive expansion of judicial power and strips court-martial members of their authority. Entrusting military judges to assign the sentencing categories is not an unreasonable expansion of judicial authority.³⁷² Judges currently adjudge sentences in the majority of general courts-martial.³⁷³ The federal criminal system uses trial judges to adjudge sentences in all cases that are not capital.³⁷⁴ Similarly, forty-five of the states use judges for criminal sentencing.³⁷⁵

Additionally, requiring the military judge to assign sentencing categories will not strip the members of their sentencing authority. Members will have complete discretion to determine all other lawful punishments that apply.³⁷⁶ Members may adjudge any confinement that falls within the range suggested by the sentencing matrix. Additionally, the panel can recommend that the convening authority use clemency to reduce confinement.³⁷⁷ The role of judges in assigning sentencing categories assists members because it makes sentence uniformity determinations that the members, due to their lack of exposure to the military justice system, are unable to make.³⁷⁸

370. *Id.* at 181-82.

371. *See* United States v. Mamaluy, 27 C.M.R. 176, 179-80 (C.M.A. 1959) (finding that sentence uniformity is not practical within the context of the military sentencing system).

372. *See* MCM, *supra* note 16, ch. X; Lovejoy, *supra* note 40.

373. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; and Air Force Data, *supra* note 6.

374. USSG, *supra* note 8, § 5.K1.1-5.K1.2.16.

375. Lanni, *supra* note 13, at 1790.

376. MCM, *supra* note 16, R.C.M. 1003. The members will have the sole discretion to determine whether a punitive discharge should be adjudged, and if so, the type of punitive discharge to award, whether forfeitures and fines apply, and any reduction in rank that might be imposed.

377. *Id.* R.C.M. 1107(d).

378. United States v. Mamaluy, 27 C.M.R. 176, 181 (C.M.A. 1959).

Further, sentencing categories ensure that a majority of the courts-martial will be sentenced under either Category II, III, or IV. By funneling sentences into the middle three categories, similar crimes will receive similar sentences, and sentence uniformity will be increased.

Category III is the appropriate category when aggravating, mitigating, and extenuating circumstances tend to cancel each other out.³⁷⁹ It is the default setting. For example, assume that the military judge found the mitigating fact that the accused had good military character. Also, assume the judge found the aggravating fact that the crime was committed against the accused's roommate. If the judge finds that the mitigating and aggravating factors are equal, (that is, cancel each other out) the judge should assign Category III to the crime.

Category II offers less confinement than Categories III, IV, or V. The military judge must mandate sentencing under Category II when he finds that extenuation or mitigation evidence outweighs aggravation evidence.³⁸⁰ As an example, assume the government presents aggravation evidence that the accused's absence without leave resulted in a second airman having to work an extra shift to make up for her absence. Also, assume that the defense presents as extenuation evidence that the accused was absent without leave because he had just been notified that his grandfather had died. In this case, the judge might find that the extenuation evidence outweighs the aggravation evidence and apply Category II.

Category IV is the opposite of Category II. Category IV is applied when the military judge determines that aggravating factors outweigh mitigating and extenuating factors.³⁸¹ For example, assume the same scenario as in the preceding paragraph, except that the reason the accused was absent without leave was because he wanted to visit Sea World. Under these facts, the judge can find that the aggravation outweighs the mitigation and assign Category IV to the accused.

379. Category III also applies if no evidence in aggravation, extenuation, or mitigation is presented.

380. MCM, *supra* note 16, R.C.M. 1001, 1002. The practice of considering extenuation and mitigating factors is part of the current military justice system. Extenuating and mitigating factors can relate to the commission of the crime. They may also relate to circumstances that surround the crime or the personal history of the accused.

381. *Id.* R.C.M. 1001.

Category I applies when evidence in extenuation or mitigation is so overwhelming that it would be unjust to sentence the accused under any other category. Category I will always have no confinement as an option. Upon a finding that Category I applies, the military judge will be required to read into the record the factors that warrant a Category I determination.³⁸² The military judge should only apply Category I in rare circumstances.

Category V is the opposite of Category I. Category V applies when evidence in aggravation is so strong that to sentence under any other category would be unjust. Category V will always contain the maximum confinement allowed. As an example, assume that the judge found aggravating the fact that the victim lost sight in one eye and will never be able to taste food again, all the result of the vicious assault committed upon him by the accused. As mitigation evidence, the defense counsel presents evidence that the accused recently received a letter of commendation for doing well during an inspection. Under this scenario, the judge may find that the aggravation rose to such a level that justice demands sentencing under Category V. Like Category I, the judge will be required to read into the record the factors that warrant a Category V determination.

3. *The Military Sentencing Matrix Shell*

The sentencing matrix is established when the categories (horizontal axis) are combined with the punitive articles (vertical axis). An excerpt of the sentencing matrix shell follows in Figure 3.

| SENTENCING MATRIX | | | | | |
|--------------------------|---------------|----------------|-----------------|----------------|---------------|
| | CATEGORY I | CATEGORY II | CATEGORY III | CATEGORY IV | CATEGORY V |
| Article 118 | | | | | |
| Article 119 | | | | | |
| Article 120 | | | | | |

FIGURE 3

³⁸² This article envisions this process to be very similar to current motion practice. The judge would be obligated to read into the record the facts that support sentencing under either Category I or V.

The next step necessary to complete the sentencing matrix is to determine the confinement range. The sentencing matrix displays a confinement range at the intersection of each punitive article and sentencing category.

4. *Determining the Confinement Range*

This section illustrates how the confinement range was determined for several of the punitive articles. This section will not discuss the individual process used for every punitive article because that would be too voluminous. While this section covers only a sampling of the punitive articles, all of the punitive articles listed in Appendix B underwent the same process.

The proposed confinement ranges were determined by using three primary sources. First, when the military crime had a federal counterpart (that is, murder), the *Federal Sentencing Guidelines Manual* was consulted to see how the federal government treated the criminal conduct.³⁸³ Second, military sentencing data was collected and studied to determine historical sentencing practices.³⁸⁴ Third, the *Manual for Courts Martial* was used to determine the maximum authorized confinement.³⁸⁵ The information provided by these three sources was combined to determine the sentencing range. The examples below illustrate this process.

Article 118, murder, is a good illustration of the process of determining the confinement range.³⁸⁶ It demonstrates the process of calculating a confinement range when the federal system and military system address almost identical crimes. The *Manual for Courts-Martial* identifies four classifications of murder.³⁸⁷ Premeditated murder (classification one) and felony murder (classification four) carry a maximum sentence of death and a minimum sentence of confinement for life.³⁸⁸ The remaining two classifications, intent to kill or inflict great bodily harm (classification two) and acts inherently dangerous to another (classification three), carry a maxi-

383. USSG, *supra* note 8, § 5.K1.1-5.K1.2.16.

384. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data *supra* note 6.

385. MCM, *supra* note 16, pt. IV, ¶¶ 60-113.

386. *Id.* pt. IV, ¶ 43.

387. *Id.*

388. *Id.* pt. IV, ¶ 41. Capital cases will not be sentenced under sentencing guidelines. Capital cases will continue to be sentenced in accordance with R.C.M. 1004.

mum sentence of confinement for life. Neither classification two or three has a minimum sentence.

Intent to kill or inflict great bodily harm and acts inherently dangerous to another (that is, murder which does not have a mandatory sentence of life imprisonment) have a mean military sentence of 291 months.³⁸⁹ The sentencing range is 60 months to 516 months.³⁹⁰

The federal sentencing guidelines assign first degree murder an offense level of forty-three.³⁹¹ Level forty-three offenses have a mandatory sentence of life imprisonment.³⁹² Second degree murder is a level thirty-three offense.³⁹³ A level thirty-three offender, who does not have a criminal history, faces a sentencing range of 135-168 months.³⁹⁴

When you combine the above information the following sentencing matrix is created for the crime of murder. The numbers relate to months of confinement.

| | Category I | Category II | Category III | Category IV | Category V |
|-----------------|------------|-------------|--------------|-------------|------------|
| Art. 118 | | | | | |
| Class. 1 | Life-death | Life-death | Life-death | Life-death | Life-death |
| Class. 2 | 0-84 | 85-131 | 132-168 | 169-240 | 241-life |
| Class. 3 | 0-84 | 85-131 | 132-168 | 169-240 | 241-life |
| Class. 4 | Life-death | Life-death | Life-death | Life-death | Life-death |

FIGURE 4

The next article that illustrates the process of determining the sentencing range is Article 119 manslaughter.³⁹⁵ The Uniform Code of Military

389. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data, *supra* note 6.

390. *Id.*

391. USSG, *supra* note 8, § 2.A1.1.

392. *Id.* § 2.A1.1; ch. 5, pt. A.

393. *Id.* § 2.A1.2

394. *Id.* § 2.A1.1; USSG, *supra* note 8, ch. 5, pt. A.

395. MCM, *supra* note 16, pt. IV, ¶ 44.

Justice splits manslaughter into two classifications.³⁹⁶ The first classification is voluntary manslaughter. Voluntary manslaughter has an attendant maximum punishment of fifteen years of confinement.³⁹⁷ The second classification is involuntary manslaughter. Involuntary manslaughter may be punished by up to ten years of confinement.³⁹⁸

During the past year, the mean confinement for a service member convicted of voluntary manslaughter was eighty-three months.³⁹⁹ The mean confinement adjudged by the military for involuntary manslaughter was forty-one months.⁴⁰⁰

The federal system divides manslaughter into three categories. The first federal category is voluntary manslaughter. It has a base offense level of twenty-five and a sentencing range of fifty-seven to seventy-one months.⁴⁰¹

The second category is involuntary manslaughter. Involuntary manslaughter has a base offense level of fourteen and a confinement range between fifteen and twenty-one months.⁴⁰² The final federal category is criminally negligent manslaughter.⁴⁰³ This category has an offense level of ten.⁴⁰⁴ Those convicted under this category face a confinement range of between six and twelve months.⁴⁰⁵

In light of this data discussed above, the following sentencing matrix is created for Article 119.

396. *Id.*

397. *Id.*

398. *Id.*

399. Army Data, *supra* note 7; USN/USMC Data, *supra* note 123; Air Force Data, *supra* note 6.

400. *Id.*

401. USSG, *supra* note 8, § 2.A1.3; *id.* ch. 5, pt. A.

402. *Id.* § 2.A1.4; *id.* ch. 5, pt. A.

403. *Id.* § 2.A1.4.

404. *Id.*

405. *Id.* § 2.A1.4; *id.* ch. 5, pt. A.

| | Category I | Category II | Category III | Category IV | Category V |
|-----------------|------------|-------------|--------------|-------------|------------|
| Art. 119 | | | | | |
| Class. 1 | 0-48 | 49-56 | 57-71 | 72-83 | 84-180 |
| Class. 2 | 0-12 | 13-20 | 21-40 | 41-72 | 73-120 |

FIGURE 5

The third crime addressed in this section is Article 112a, wrongful use, possession, and distribution of controlled substances.⁴⁰⁶ It demonstrates the process of calculating a confinement range when the federal system and military system address similar crimes, but address those crimes in a different manner.

Article 112a splits drug offenses into four sentencing classifications.⁴⁰⁷ Generally, the only distinctions the military applies to these drug classifications is that crimes involving less than thirty grams of marijuana (or any amount of Phenobarbital or a Schedule IV and V controlled substances) carry less confinement than offenses involving drugs such as cocaine and heroine.⁴⁰⁸ The mean sentence and sentencing range was determined for each of these classifications through the process described earlier in this article.⁴⁰⁹

The federal system uses much more detail than the military system to sentence drug offenders. The *Federal Sentencing Guidelines Manual* devotes forty pages to drug offenses.⁴¹⁰ Generally, the federal system increases punishment as the quantity of the drug increases. The federal system also increases punishment for the type of drug. A drug equivalency table illustrates the varying severity of different drugs. Marijuana is the common currency that illustrates this severity. For example, one gram of heroin is equivalent to one kilogram of marijuana; while one gram of methamphetamine equates to two kilograms of marijuana.

406. MCM, *supra* note 16, pt. IV, ¶ 37.

407. *Id.* pt. IV, ¶ 37.e.

408. *Id.*

409. *See* discussion *supra* Section IV.

410. USSG, *supra* note 8, § 2.D1.1-2.D3.5.

The federal sentencing guidelines employ dozens of different sentencing ranges. It is not necessary to reiterate every permutation. Instead, the following examples illustrate the federal confinement ranges that are most relevant for comparison to the military.

A defendant convicted of distributing more than 250 grams but less than 1000 grams of marijuana has a base offense level of eight and a sentencing range of zero to six months. Distribution of between two grams and three grams of crack cocaine has a base offense level of twenty and a sentencing range of thirty-three to forty-one months. Unlawful possession of cocaine has a base offense level of six and a corresponding confinement range of zero to six months.

When you combine the above the below sentencing matrix is created.

| | Category I | Category II | Category III | Category IV | Category V |
|------------------|------------|-------------|--------------|-------------|------------|
| Art. 112a | | | | | |
| Class. 1(a) | 0-5 | 6-11 | 12-23 | 24-47 | 48-60 |
| Class. 2(b) | 0-3 | 1-3 | 4-9 | 10-17 | 18-24 |
| Class. 2(a) | 0-11 | 12-23 | 24-48 | 49-119 | 120-180 |
| Class. 2(b) | 0-5 | 6-11 | 12-23 | 24-47 | 48-60 |

FIGURE 6

The final example will illustrate how the sentencing range is determined for a crime that is unique to the military. Article 90, assaulting or willfully disobeying a superior commissioned officer, is one such crime. For sentencing purposes, the *Manual for Courts-Martial* divides Article 90 into three classifications. Classification one is for “striking, drawing, or lifting up any weapon or offering any violence to superior commissioned officer in the execution of office.”⁴¹¹ Classification one has a maximum punishment of ten years. The mean military sentence for classification one is thirty-two months.

411. MCM, *supra* note 16, pt. IV, ¶ 14.e.(1).

Classification two is for disobeying the lawful order of a superior commissioned officer.⁴¹² The maximum punishment for classification two is sixty months. The mean confinement adjudged at a general court-martial for this classification is eight months.

The final classification relates to the above offenses in the time of war.⁴¹³ The maximum punishment for classification three is death. There was insufficient data to calculate a mean sentence for violations of this classification.

When you combine the data for Article 90, the sentencing matrix below is created.

| | Category I | Category II | Category III | Category IV | Category V |
|----------------|------------|-------------|--------------|-------------|------------|
| Art. 90 | | | | | |
| Class. 1 | 0-18 | 19-23 | 24-36 | 37-47 | 48-120 |
| Class. 2 | 0-3 | 4-5 | 6-18 | 19-35 | 36-60 |
| Class. 3 | 0-11 | 12-23 | 24-59 | 60-179 | 180-death |

FIGURE 7

The figure above provides a sample of the analysis involved in determining the sentencing range. This process is repeated for each punitive article contained in Appendix B.

C. Departure from Military Sentencing Guidelines and the Role of the Convening Authority

For military sentencing guidelines to be most effective, the sentencing authority would not be allowed to depart from the proposed guidelines. The sentencing authority would be required to adjudge confinement from the range defined by the military sentencing matrix. In those cases where the sentencing authority believes the guidelines result in punishment that is too severe, the sentencing authority could recommend a guideline departure, on the record, to the convening authority. Only the convening author-

412. *Id.* pt. IV, ¶ 14.e.(2).

413. *Id.* pt. IV, ¶ 14.e.(3).

ity (or superiors in his chain of command) would be permitted to authorize a departure from the proposed military sentencing guidelines.⁴¹⁴

The authority to depart from the guidelines would be based on the convening authority's clemency powers that already exist under the current system.⁴¹⁵ Using clemency, the convening authority may depart from the sentencing guidelines and reduce the sentence.⁴¹⁶ While the convening authority may reduce any sentence, he may never increase a sentence.⁴¹⁷

Additionally, the convening authority may agree to depart from sentencing guidelines (and any adjudged sentence) through the use of a pre-trial agreement.⁴¹⁸ The convening authority may agree to exercise his power to limit a sentence in return for some concession on the part of the accused.⁴¹⁹ This concession often takes the form of a guilty plea.

Critics may argue that the proposed military sentencing guidelines would have a coercive effect on the individual accused. Those critics may argue that since only the convening authority can depart from the guidelines, that the accused would be placed in a position of weakness when negotiating with the convening authority. He would be in a position of weakness because he would have the choice of either accepting the convening authority's offer or facing the sentencing range mandated by the guidelines.

The above criticism is faulty. The accused, regardless of the plea agreement, may argue for sentencing under either Category I or II. If he is sentenced under Category I, he may receive no confinement. Additionally, the facts of the case may actual put the accused in a positive negotiation stance. If the facts surrounding the sentencing case make a Category IV or V determination remote, then the accused's exposure to maximum confinement is reduced.

By retaining the present role of the convening authority, much of the current military justice system will remain in place. The accused retains

414. *Id.* R.C.M. 1107.

415. *Id.* The convening authority must take action for a court-martial to be final. The convening authority may reduce any sentence or set aside a conviction that was adjudged at a courts-martial that he convened.

416. *Id.*

417. *Id.*

418. *Id.* R.C.M. 705.

419. *Id.*

his ability to bargain with the convening authority for any sentence. Similarly, the convening authority retains his present position in the military justice system.

VI. Major Criticisms of the Federal Sentencing Guidelines

The federal sentencing guidelines were a major change to the federal sentencing process.⁴²⁰ The guidelines have been in effect since surviving constitutional challenge in the 1989 case of *Mistretta v. United States*.⁴²¹ The federal guidelines have been used to sentence nearly a half-million defendants.⁴²² While the guidelines are firmly entrenched, they have been widely criticized.⁴²³ This section discusses the primary criticisms leveled against the federal sentencing guidelines. It will also illustrate how the proposed military sentencing guidelines avoid many of these criticisms.

The criticisms most often raised are: (1) the federal sentencing guidelines have reduced the moral force and significance of the sentencing ritual;⁴²⁴ (2) the federal sentencing guidelines encourage sentence entrapment;⁴²⁵ (3) the results of sentencing guidelines are sentences that are too severe;⁴²⁶ (4) the federal sentencing guidelines are too rigid and formalistic;⁴²⁷ (5) the probation officer plays too prominent of a role in determining the sentence;⁴²⁸ (6) sentencing discretion has shifted from the trial judge to the prosecutor;⁴²⁹ and (7) the sentencing guidelines greatly

420. See discussion *supra* Section III.B.

421. *Mistretta v. United States*, 488 U.S. 361 (1989). The constitutionality of the Sentencing Reform Act and the federal sentencing guidelines were challenged on improper legislative delegation and separation of powers grounds. The court rejected the challenge on 18 January 1989. Since *Mistretta*, federal sentencing guidelines have been used to sentence almost 500,000 federal defendants.

422. See REPORT, *supra* note 210.

423. See *infra* notes 424-430.

424. See Stith & Carbanes, *supra* note 137, at 1252-53. See also Wright, *supra* note 161, at 1366 (quoting KATE STITH & JOSE A. CARBANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS (1998)).

425. See Witten, *supra* note 162. See also Marcia G. Stein, *Sentencing Manipulation and Entrapment*, CRIM. JUST., Fall 1995, at 25.

426. See Thomas N. Whiteside, *Symposium: The Federal Sentencing Guidelines: Ten Years Later: The Reality Of Federal Sentencing: Beyond The Criticism*, 91 Nw. U. L. REV. 1574, 1581 (1997).

427. See Stith & Carbanes, *supra* note 137, at 1253. See also Wright *supra* note 161, at 1366-77.

428. See Stith & Carbanes, *supra* note 137, at 1256-63.

429. See Lanni, *supra* note 13, at 1786. See also Freed, *supra* note 163.

reduce the opportunity for the sentencing authority to consider and weigh aggravating, extenuating, and mitigating factors.⁴³⁰ Each of these criticisms is discussed below.

Critics of the federal sentencing guidelines complain that sentencing guidelines reduce the moral impact of sentencing.⁴³¹ Before guidelines, the interaction between the federal trial judge and the accused was the focus of the sentencing process.⁴³² The judge had wide discretion to fashion a sentence that he believed satisfied the goals of sentencing.⁴³³ The statutory maximum sentence was the only check upon judicial discretion.

Before adopting sentencing guidelines, the judge ruled the courtroom.⁴³⁴ The victim of the crime looked to the judge to fashion a sentence that satisfied punishment and retribution.⁴³⁵ Those close to the defendant hoped the judge would be merciful.⁴³⁶ The public looked for sentences that would either remove the defendant from society or rehabilitate the wrongdoer.⁴³⁷

When it came time to announce the sentence, the defendant rose and faced the judge.⁴³⁸ The judge represented the vast power of both state and society. The judge announced the sentence.⁴³⁹ The defendant was judged. The judgment had moral force because the judge applied the goals of sentencing to the facts of the case and determined an individual sentence for the defendant.⁴⁴⁰ It was the creation of the individual sentence that was the cornerstone of the moral authority of the bench.⁴⁴¹

430. See Ogletree, *supra* note 140, at 1953.

431. See Stith & Carbanes, *supra* note 137, at 1252-53.

432. *United States v. Davern*, 970 F.2d. 1490 (6th Cir. 1992). Sentencing is a human process that requires interaction between the judge and the defendant. *United States v. Naugle*, 879 F. Supp. 262, 265 (E.D.N.Y. 1995) (Weinstein, J.). Human interaction between the judge and the defendant are necessary in order for a sentence to realize its full impact.

433. See Freed, *supra* note 163, at 1687-88.

434. See Stith & Carbanes, *supra* note 137, at 1250-53.

435. See Tagliareni, *supra* note 136, at 416.

436. See Hoelter et al., *supra* note 141. See also Stith & Carbanes, *supra* note 137.

437. See Ogletree, *supra* note 140, at 1940-45.

438. See Stith & Carbanes, *supra* note 137, at 1253.

439. *Id.* at 1248.

440. *United States v. Naugle*, 879 F. Supp. 262, 265 (E.D.N.Y. 1995) (Weinstein, J.).

441. See Stith & Carbanes, *supra* note 137, at 1253.

Critics argue that the sterile sentencing environment produced by sentencing guidelines reduces the moral authority of the bench.⁴⁴² They argue that a predetermined sentence evaporates the authority of the sentencing judge.⁴⁴³ The sentencing judge is not the Solomon-like figure of the pre-guideline era.⁴⁴⁴ The judge is reduced to a bureaucrat who calculates a sentence by applying rigid standards to a chart.⁴⁴⁵ Critics argue that sentencing guidelines minimize the moral authority of the bench because they reduce the ability of the judge to relate to the defendant and fashion an individual sentence.⁴⁴⁶

Critics further argue that the accused and all interested parties are either aware of the predetermined sentencing range or so confused by the process that the sentencing ritual loses its impact.⁴⁴⁷ The decision to increase or decrease an offense level is predetermined by the facts of the case, the way the prosecutor charges the crime, and the probation officer's sentencing report. Since the sentence is largely predetermined, the moral authority of the bench to fashion an individual sentence is greatly reduced.⁴⁴⁸

Critics of sentencing guidelines argue that the impact of the entire sentencing process is diminished when the real and perceived authority of the sentencing judge is reduced.⁴⁴⁹ They argue that the trial judge must sentence with moral and societal authority.⁴⁵⁰ The judge must truly judge the offender. It is by judging that society morally condemns an individual and his acts.⁴⁵¹ The trial judge must retain his ability to judge in order for the sentence to be effective.⁴⁵² Critics of the guidelines complain that the

442. *Id.* at 1263-64.

443. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

444. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

445. *See* Stith & Carbanes, *supra* note 137, at 1253-54.

446. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

447. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

448. *See* Ogletree, *supra* note 140, at 1953. *See also* Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

449. *See* Stith & Carbanes, *supra* note 137, at 1263-72.

450. *Id.* at 1252-53.

451. *Id.*

452. *Id.*

guidelines strip the trial judge of his moral authority by reducing his ability to directly relate to the defendant and fashion an individual sentence.⁴⁵³

The proposed military sentencing guidelines preserve the moral authority of the military sentencing ritual.⁴⁵⁴ The only portion of the sentence that the guidelines impact is confinement. The sentencing authority is either the military judge or the court-martial members.⁴⁵⁵ The military judge determines the sentencing category. After the category is established, the sentencing authority determines the sentence after considering the evidence presented by both the government and the defense.⁴⁵⁶ The sentence is not predetermined. The sentencing authority retains its moral authority to judge the accused. The sentencing authority retains its moral authority because it is allowed to consider the case in aggravation and matters in extenuation and mitigation. Only after considering these matters will the sentencing authority fashion a complete sentence that judges the individual accused.

Once the sentence is determined, the sentencing ritual will retain the same moral significance as the present system.⁴⁵⁷ The accused will rise to face the sentencing authority.⁴⁵⁸ The sentencing authority will look the accused in the eye and announce the sentence.⁴⁵⁹ The sentence will carry the same type of moral impact as that provided for by the current military sentencing system.⁴⁶⁰

The next major criticism of the federal sentencing guidelines is that the sentencing guidelines encourage sentence entrapment.⁴⁶¹ Sentence entrapment occurs when criminal investigators organize an investigation (that is, a sting) in a fashion that results in a prosecution at a high offense level.⁴⁶² Most of the federal crimes escalate the offense level when certain aggravating factors are present.⁴⁶³ Critics argue that investigators “set up” suspects by tailoring the investigation in a manner that increases the

453. See Ogletree, *supra* note 140, at 1953. See also Stith & Carbanes, *supra* note 137; Hoelter et al., *supra* note 141.

454. See discussion *supra* Section V.B.

455. MCM, *supra* note 16, R.C.M. 903.

456. *Id.* R.C.M. 1001.

457. See BENCHBOOK, *supra* note 18, at 105-06.

458. *Id.*

459. *Id.*

460. *Id.*

461. See Witten, *supra* note 162. See also Hoelter et al., *supra* note 141, at 1085-86.

462. Recall that the amount of confinement increases as the offense level increases.

463. USSG, *supra* note 8, ch. 2

offense level.⁴⁶⁴ They argue that investigators take steps to increase the offense level, not because the steps are necessary for the investigation, but because the increase will assist the prosecution or help gain investigative assistance from the suspect.⁴⁶⁵ These critics complain that when a suspect is prompted by investigators to engage in criminal acts with aggravating factors, the accused is a victim of entrapment.⁴⁶⁶ This is especially true when the suspect would not have committed the aggravating factors but for the prompting of the investigator.⁴⁶⁷

As an example, if an undercover agent requests that a suspect transforms powder cocaine to crack cocaine, the offense level can increase dramatically.⁴⁶⁸ In *United States v. Shephard*⁴⁶⁹ the investigators did exactly this and the suspect's sentencing range increased from 27-33 months to 121-151 months.⁴⁷⁰ Critics argue that when the government knowingly prompts a suspect to engage in acts solely to increase the offense level, the government is unjustly entrapping the suspect.⁴⁷¹

The proposed military sentencing matrix avoids sentence entrapment. The proposed sentencing matrix does not use the federal offense levels. Instead, the proposed military sentencing matrix relies on a combination of sentencing categories and punitive article classifications.

Sentencing categories avoid sentence entrapment by allowing the military judge discretion in assigning the sentencing category.⁴⁷² The military judge determines the sentencing category that applies to every court-martial.⁴⁷³ The judge has complete discretion to select any of the five sentencing categories.⁴⁷⁴ The sentencing categories cover every confinement

464. See Hoelter et al., *supra* note 141, at 1085-86.

465. See Witten, *supra* note 162; Hoelter et al., *supra* note 141.

466. See Witten, *supra* note 162; Hoelter et al., *supra* note 141.

467. Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses in Federal Court*, 27 WAKE FORREST L. REV. 829, 831 (1992).

468. USSG, *supra* note 8, § 2D1.1.

469. *United States v. Shephard*, 4 F.3d 647 (8th Cir. 1993).

470. *Id.* Mr. Shephard converted powder cocaine into crack cocaine at the request of the undercover agent. Because the federal sentencing guidelines apply a 100:1 ratio to crack cocaine, that is, a person who sells 2 grams of crack cocaine falls under the same guideline as a person who sells 200 grams of powder cocaine, Mr. Shephard faced an approximately five fold increase in his sentencing range.

471. See Witten, *supra* note 162, at 716.

472. See discussion *supra* Section V.B.

473. *Id.*

474. *Id.*

option, from no confinement to the maximum confinement allowed. The investigator does not know which category the judge will apply to a particular case; thus, the investigator will not be able to influence the sentencing range in the same manner that he is able to in the federal system. For example, a military investigator cannot predetermine a sentencing range by “entrapping” the accused to sell five grams of crack cocaine instead of twenty grams of powder cocaine.

The use of classifications further reduces the risk of sentencing entrapment. The classifications relate to the type of crime committed.⁴⁷⁵ Longstanding criminal distinctions determine classifications.⁴⁷⁶ For the most part, the *Manual for Courts-Martial* does not dramatically increase punishment based solely on quantity or type distinctions.⁴⁷⁷ Even for crimes where quantity or type function to increase punishment, the nature or circumstances that surround the crime determine the increase in punishment.⁴⁷⁸ For example, possession of more than thirty grams of marijuana increases the maximum punishment from two years to five years.⁴⁷⁹ This quantity distinction does not apply to cocaine, heroine, methamphetamines, or a host of other narcotics.⁴⁸⁰ Similarly, larceny⁴⁸¹ only increases the maximum punishment based on whether: the value of the theft was more than \$100, the crime involved a vehicle, ammunition, or a firearm, or the crime was committed against the military.⁴⁸²

The next criticism levied against the federal sentencing guidelines is that they result in sentences that are too severe. Critics point to the fact that the United States has the highest incarceration rate in the world.⁴⁸³ Since sentencing guidelines went into effect, the federal prison population has increased by more than three fold.⁴⁸⁴ This population increase is due, in

475. MCM, *supra* note 16, pt. IV.

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.* pt. IV, ¶ 37.

480. *Id.*

481. *Id.* pt. IV, ¶ 46.

482. *Id.* The maximum allowable punishment increases as the value of the larceny increases or if the larceny is committed against the military or involves a motor vehicle, aircraft, vessel, firearm, or explosive. Unlike the federal sentencing guidelines that has a host of sentencing range based on the value of the larceny, the military primarily uses the categories of more than or less than \$100 and whether or not the larceny was committed against the military.

483. See Hoelter et al., *supra* note 141, at 1083. The United States has approximately 1.5 million people in confinement.

large part, to a combination of an increase in severity of sentences and the elimination of parole.⁴⁸⁵ Critics argue that the increase in sentence severity is due, in part, to the inflexibility of the federal sentencing guidelines.

The most prevalent complaint regarding severity of sentencing in the federal system involves the sentencing of drug cases.⁴⁸⁶ In the federal system, the sale of one gram of crack cocaine falls under the same offense level as the sale of one hundred grams of powder cocaine.⁴⁸⁷ This distinction raises particular criticism on the issue of race.⁴⁸⁸ Critics argue that crack cocaine is most prevalent amongst minorities while powder cocaine is most prevalent in Caucasian society.⁴⁸⁹ Thus, the sentence for a minority who sells one gram of crack is similar to the sentence for a person that sells one hundred grams of powder cocaine. Critics complain that this distinction between crack and powder cocaine results in sentences that are too severe.

Additionally, critics complain that the federal sentencing guidelines increase sentence severity by eliminating judicial discretion. As the federal sentencing guidelines mandate a sentencing range, the judge is normally unable to fashion a sentence that falls below the minimum sentence suggested by the guidelines.⁴⁹⁰ Because the judge is limited in sentencing options, critics contend that the sentencing guidelines result in sentences that are too severe.

The military sentencing matrix avoids this criticism. Punitive articles are not assigned offense levels. The range of confinement does not automatically increase due to aggravating factors. Under the proposed military sentencing guidelines, the military judge determines the appropriate sentencing category while the sentencing authority determines the actual confinement. The accused may argue for, and receive, any lawful sentence.⁴⁹¹ The accused can present extenuation and mitigation evidence in an attempt to convince the military judge to assign the offense a low sentencing cate-

484. *Id.* at 1087. In 1987 there were approximately 35,000 inmates in federal prisons. In 1998 this figure increased to approximately 110,000 inmates.

485. *See* Stith & Carbanes, *supra* note 137, at 1254-70.

486. *See* Whiteside, *supra* note 426, at 1581-82.

487. *See* USSG, *supra* note 8, § 2D1.1.

488. *See* Whiteside, *supra* note 426, at 1582.

489. *Id.*

490. *See* USSG, *supra* note 8, § 5K1.1-5K2.16. The trial judge is allowed to depart from the sentencing guidelines in rare circumstances.

491. *See* MCM, *supra* note 16, R.C.M. 1001, 1002, 1003.

gory (that is, Category I or II). If the accused is persuasive, the accused may receive no confinement.⁴⁹²

The next criticism leveled against the federal sentencing guidelines is that the guidelines are too rigid and formalistic.⁴⁹³ Critics argue that rigid sentencing guidelines reduce to almost zero the discretion that the trial judge has when fashioning a sentence.⁴⁹⁴ They complain that the rigid nature of the federal sentencing guidelines make departure rare.⁴⁹⁵ Departure normally requires the concurrence of the prosecutor.⁴⁹⁶

Critics complain that applying the federal sentencing chart is formalistic in the sense that sentencing guidelines reduce the judge to a human calculator.⁴⁹⁷ The judge determines the sentencing range through calculus instead of through principled reasoning.⁴⁹⁸ This state of affairs has led federal judges to refer to themselves as “notary publics” and “accountants.”⁴⁹⁹

The proposed military sentencing matrix overcomes this criticism. While the military sentencing matrix is formal, the judge retains discretion as to which of the five sentencing categories apply to the accused. Both the military judge and the sentencing authority are required to fully consider extenuation, mitigation, and the case-in-aggravation before determining the sentence.⁵⁰⁰ The ability of the sentencing judge to fully consider a wide array of sentencing evidence and appoint the appropriate sentencing category ensures that the military judge does much more than read a chart. The proposed military sentencing guidelines require complete participation by the military judge and the sentencing authority. Involving the judge and members in the application of the sentencing guidelines is what overcomes the criticism that the proposed military sentencing guidelines are too rigid.

Additionally, the proposed military sentencing guidelines only influence confinement and does not effect other forms of punishment.⁵⁰¹ Thus,

492. *Id.*

493. See Stith & Carbanes, *supra* note 137, at 1253.

494. See Witten, *supra* note 162, at 702-04.

495. 18 U.S.C. § 3553 (2000); Witten, *supra* note 162, at 704.

496. See USSG, *supra* note 8, § 5K1.1; Stith & Carbanes, *supra* note 137, at n.24.

497. See Stith & Carbanes *supra* note 137, at 1255-56.

498. See *id.* at 1254.

499. Frank S. Gilbert, *The Probation Officer's Perception of the Allocation of Discretion*, 4 FED. SENTENCING REP. 109, 109 (1991); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986).

500. MCM, *supra* note 16, R.C.M. 1001.

any formality or rigidity that applies to the military sentencing guidelines is tempered because the military sentencing guidelines only relate to adjudged confinement.

The fifth criticism of the federal sentencing system is that probation officers play too prominent a role in determining the sentence.⁵⁰² In the federal system, the probation officer prepares the presentence report, applies his understanding of the facts to the sentencing guidelines, and performs the sentencing calculations.⁵⁰³ The probation officer provides the federal trial judge a proposed sentencing range.⁵⁰⁴

The probation officer is considered the sentencing guideline expert.⁵⁰⁵ The presentencing report normally becomes the focus of the sentencing hearing.⁵⁰⁶ Federal trial judges often accept the probation officers report as gospel.⁵⁰⁷ The result is that the probation officer may determine the sentencing range applied to the defendant.⁵⁰⁸

Critics complain that probation officers have become a third adversary in the courtroom.⁵⁰⁹ They argue that probation officers act as criminal investigators.⁵¹⁰ The focus of the investigation is the application of the sentencing guidelines to the offense. Neither the probation officer nor the sentencing guidelines focus on the character traits of the defendant.⁵¹¹

The role of probation officer as investigator often results in defense counsel advising the defendant, and those close to the defendant, not to cooperate with the probation officer.⁵¹² Defense counsel proffer this advice out of fear that the probation officer will discover facts that will

501. *Id.* R.C.M. 1001-1005.

502. *See* Stith & Carbanes, *supra* note 137, at 1257-58.

503. *Id.*

504. *Id.* at 1257.

505. *Id.* at 1258.

506. *Id.* at 1259.

507. *See* Jack B. Weinstein, *A Trial Judges Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364. *See also* Julian Abele Cook, Jr., *The Changing Role of the Probation Officer in the Federal Court*, 4 FED. SENTENCING REP. 112 (1991) *quoted in* Stith & Carbanes, *supra* note 137, at 1258.

508. *See* Stith & Carbanes, *supra* note 137, at 1259. *See also* Weinstein, *supra* note 507, at 364; Cook, *supra* note 507.

509. *See* Stith & Carbanes, *supra* note 137, at 1260-61.

510. *Id.* at 1257-58 (quoting PROBATION DIV., ADMIN. OFFICE OF THE U.S. COURTS, PUB. NO. 107, PRE-SENTENCE INVESTIGATION REPORTS UNDER THE SENTENCING REFORM ACT OF 1984, 3).

511. *See* Stith & Carbanes, *supra* note 137, at 1257-58.

operate to increase the offense level.⁵¹³ The result is that the probation officer may have a one-sided view of the offense.⁵¹⁴ The probation officer's view is one-sided because the defense does not participate.⁵¹⁵ This one-sided view may result in a faulty presentencing report. If the trial judge relies upon a faulty presentencing report, the trial judge may misapply the sentencing guidelines.⁵¹⁶

The proposed military sentencing matrix avoids the issues raised by employing probation officers. The military system does not use probation officers. The sentencing authority determines the sentence by applying the facts presented by both parties at the sentencing hearing. The prosecution and defense present their case in an adversarial setting.⁵¹⁷

The adversarial process allows the accused to present a host of sentencing evidence.⁵¹⁸ Upon conclusion of the sentencing case, the judge translates the totality of the sentencing hearing into a sentencing category. The sentencing authority does this by weighing the government's case in aggravation against the extenuation and mitigation evidence presented by the defense. After the judge determines the sentencing category, the sentencing authority applies the same evidence to fashion an appropriate sentence.

The adversarial sentencing hearing fulfills the role performed by the probation officer in the federal system. The military system avoids many of the pitfalls of the federal system because the adversarial process places the accused in control of the information he wants to present to the court-martial and gives him the authority to challenge that which he does not want considered.

The next criticism is that the federal sentencing guidelines have shifted sentencing discretion from the military judge to the federal prosecutor.⁵¹⁹ The critics claim that sentencing guidelines all but eliminate judicial sentencing discretion.⁵²⁰ They argue that the current federal system

512. See Michael Piotrowski, *The Enhanced Role of the Probation Officer in the Sentencing Process*, 4 FED. SENTENCING REP. 96, 97 (1991).

513. *Id.*

514. *Id.*

515. *Id.*

516. See Stith & Carbanes, *supra* note 137, at 1262-63.

517. See discussion *supra* Section II.B.

518. *Id.*

519. See Freed, *supra* note 163.

replaces judicial sentencing discretion with prosecutorial sentencing discretion.⁵²¹ Prosecutors can exercise sentencing discretion by manipulating the sentencing guidelines to prosecute similar criminal conduct in a disparate fashion.⁵²² For example, assume that two different men engage in unrelated criminal conduct. The conduct involves fraudulently depositing money into their bank account and then transferring that money to a different bank account.⁵²³ The prosecution has the option of charging the offender with either bank fraud or money laundering.⁵²⁴ Bank fraud carries a base offense level of seventeen while money laundering carries a base offense level of twenty-three.⁵²⁵ Critics of sentencing guidelines argue that the prosecutor can promote sentence disparity by charging one offender with bank fraud and the other with money laundering.⁵²⁶ This disparate charging results in the prosecutor exercising sentencing discretion by deciding which of the sentencing guidelines will be applied to the case at hand.⁵²⁷

The proposed military sentencing guidelines overcome this criticism through use of the judge. The military judge operates as a check on the prosecution. The military judge determines the sentencing category. If the prosecution attempts to unjustly increase punishment, the judge can check the prosecution by assigning a sentencing category that provides a confinement range that is appropriate for the criminal conduct.

The final criticism is that the federal sentencing guidelines greatly reduce the opportunity for the sentencing authority to consider and weigh aggravating, extenuating, and mitigating factors.⁵²⁸ This final criticism embraces many of the issues discussed in the previous six criticisms.⁵²⁹

The federal sentencing guidelines consider only three of the defendant's character traits.⁵³⁰ These traits are (1) criminal history, (2) dependence upon criminal activity for a livelihood, and (3) acceptance of

520. *Id.* at 1697.

521. Lanni, *supra* note 13, at 1786.

522. *See id.* at 1696-97. *See also* Witten, *supra* note 162, at 708-09.

523. *See* Hoelter et al., *supra* note 141, at 1085-86.

524. *Id.*

525. *See* USSG, *supra* note 8, § 2.S.1.1, 1.2.

526. *See* Hoelter et al., *supra* note 141, at 1085-86.

527. *Id.*

528. *See* Ogletree, *supra* note 140, at 1953.

529. *See* discussion accompanying *supra* notes 424-528.

530. *See* USSG, *supra* note 8, § 5H1.1, 1.12.

responsibility for his wrongdoing.⁵³¹ Critics of the federal guidelines argue that this narrow view does not adequately address the many character traits that factor into a sentence.⁵³² For example, the federal sentencing guidelines largely dismiss: age; education and vocational skills; mental and emotional conditions; physical condition; substance dependence or abuse; employment record; family and community ties; military, civic, and charitable work; and lack of guidance as a youth as character traits to be considered when forming a sentence.⁵³³ The federal sentencing guidelines mandate an offense level and criminal history category based upon a narrow view of the defendant.

Military sentencing allows the defense to present almost any information that would tend to explain the circumstances surrounding the commission of the offense.⁵³⁴ Additionally, the accused may present personal background and character evidence in an attempt to secure a lenient sentence.⁵³⁵

The military sentencing matrix does not ignore the personal background of the accused. The proposed military sentencing matrix allows the judge to consider a wide range of sentencing evidence to determine the appropriate sentencing category. The sentencing categories incorporate the impact of aggravating, extenuating, and mitigating evidence into their sentencing range. The proposed military sentencing matrix allows the sentencing authority to fashion a sentence that gives proper weight to the myriad of issues that influence the severity of a crime. The sentencing matrix reflects all confinement options, from no confinement to the maximum lawful confinement, authorized for the crime committed.

The proposed military sentencing matrix will avoid many of the criticisms levied against the federal sentencing guidelines. The proposed military sentencing system will incorporate the use of guidelines to enhance the largely effective military sentencing system. The next section discusses the legislative and executive modifications necessary to incorporate sentencing guidelines in the military.

531. *See id.* §§ 3E1.1, 5H1.7-5H1.9; Ogletree, *supra* note 140, at 1953.

532. *See* Ogletree, *supra* note 140, at 1953.

533. *See* USSG, *supra* note 8, § 5H1.1-1.6, 1.9-1.12. *See also* Ogletree, *supra* note 140, at 1951-53.

534. MCM, *supra* note 16, R.C.M. 1001.

535. *Id.*

VII. Legislative and Executive Modifications Necessary to Implement Military Sentencing Guidelines

The Constitution vests in Congress the authority to create the laws that govern the armed forces.⁵³⁶ Further, the Congress has exercised the bulk of this authority in Title 10 of the United States Code. The Congress defines criminal acts in the punitive articles.⁵³⁷

Particularly relevant to this discussion is 10 U.S.C. § 856. This section delegates, from Congress to the President, the authority to determine the maximum punishment allowed at courts-martial. Title 10, U.S.C. § 856 is titled “maximum limits” and states: “The punishment which a court-martial may direct for an offense may not exceed such limit as the President may prescribe for that offense.”⁵³⁸

The President, as Commander in Chief⁵³⁹ and through the authority delegated to him by Congress, creates the rules that govern the military justice system. These rules are contained in the *Manual for Courts-Martial*.⁵⁴⁰

Several legislative and executive acts must occur in order to implement sentencing guidelines. First, Congress would have to modify 10 U.S.C. § 856. The new title should be: “Maximum sentences, minimum sentences, and sentencing guidelines.” The amended text would read:

The President has the authority to establish maximum sentences, minimum sentences, and sentencing guidelines. A court-martial may not direct a punishment that exceeds the maximum limit prescribed by the President. A court-martial may not direct a punishment that is less than the minimum limit prescribed by the President. A court-martial must apply the confinement range mandated by the sentencing guidelines when the sentencing guidelines are applicable

536. U.S. CONST. art. I, ¶ 8. “To make Rules for the Government and Regulation of the land and naval Forces” *Id.*

537. 10 U.S.C. §§ 877-934 (2000).

538. 10 U.S.C. § 856.

539. U.S. CONST. art. II, ¶ 2.

540. MCM, *supra* note 16.

Modifying 10 U.S.C. § 856 as above would give the President the authority to implement sentencing guidelines. Modifying various Rules for Courts-Martial would complete implementation.⁵⁴¹

The first modification to the Rules for Courts-Martial necessary to establish sentencing guidelines involves R.C.M. 1002. Currently, R.C.M. 1002, sentence determination, reads:

Subject to limitations in this Manual, the sentences to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.⁵⁴²

The proposed modification would split R.C.M. 1002 into two subparagraphs, one for special courts-martial and the other for general courts-martial. The rule would also provide sentencing guidance for convictions of multiple specifications. Below is the proposed modification to R.C.M. 1002.⁵⁴³

(a) Special Courts-Martial. Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

(b) General Courts-Martial.

(1) Subject to the limitations in this Manual, the sentence to be adjudged, except for confinement, is a matter within the discretion of the court-martial. The court-martial must adjudge confinement consistent with the sentencing range determined by the sentencing guidelines. The sentencing range is determined

541. *Id.* R.C.M. 1001-11.

542. *Id.* R.C.M. 1002.

543. Proposed R.C.M. 1002 is a combination of the Rules for Courts-Martial and § 3D1 of the Federal Sentencing Guidelines Manual.

by finding the appropriate intersection between the punitive article and the offense category. The military judge has complete discretion to assign the sentencing category. The military judge shall instruct the members which punitive article, classification, and sentencing category applies. The members, or military judge if appropriate, have complete discretion to choose any confinement from the confinement range mandated by the sentencing guidelines.

(2) If the accused is found guilty of two or more punitive articles, the following rules shall be applied when determining the sentencing range.

(A) The military judge will first determine those crimes that are so closely intertwined that they cover the same criminal act. For all closely intertwined criminal acts the sentencing range for the most serious of the crimes shall be the sentencing range for all of the intertwined crimes. The judge may consider the additional crimes for determining the category to apply to the most serious offense.

(B) If the judge determines that the crimes are not closely intertwined, then the judge will first determine the sentencing category that applies to each punitive article. Next, the judge will determine the most serious crime. The judge will then multiply the high and low value of the sentencing range(s) that apply to the lesser crimes by .25 and add that amount to the high and low value of the sentencing range for the most serious crime.

(3) The sentencing guideline matrix will be contained in Appendix 26 of the Manual for Courts-Martial.

The next Rule for Courts-Martial that requires modification is R.C.M. 1005, instructions on sentence. Modifying R.C.M. 1005 is necessary to provide instructions that are consistent with sentencing guidelines. The proposed modification would follow R.C.M. 1005(e) and read as follows.

(1) *Special Courts-martial.* A statement of the maximum authorized punishment that may be adjudged.

(2) *General Courts-martial.* A statement of the sentencing range that applies to the case. A statement of both the maximum

and minimum confinement that may be adjudged. A statement that the members must sentence the accused to confinement within the sentencing range specified by the military judge. A statement as to which sentencing category is to be applied to the crime(s) and instruction on how to apply the sentencing guidelines.

Deliberations and voting on sentence, R.C.M. 1006, must also be modified to include language that explains how the members are to apply the sentencing guidelines. This rule should include a new paragraph (d) that reads,

(d) *Fashioning a sentence by using the sentencing guideline matrix in Appendix 26.*

(1) The sentencing guideline matrix contained in Appendix 26 must be used to determine the amount of confinement, if any, which is to be adjudged. The military judge will instruct the members as to the use of the sentencing guidelines contained Appendix 26. The military judge will determine the category that applies to each general courts-martial. Confinement, whether adjudged by members or judge, shall fall within the sentencing range determined by sentencing guideline matrix.

(2) Once a confinement range is determined, each member will propose a sentence in writing and in secret. Each proposed sentence will contain confinement that falls within the range determined by the sentencing matrix. The junior member will collect the sentences and arrange them from the sentence which contains the least confinement to the sentence that contains the most confinement. The members will next vote on the sentences from least severe to most severe. The members shall vote in secret. The members shall vote until at least two-thirds agree on a sentence.

Finally, Part IV of the *Manual for Courts-Martial*, Punitive Articles, must be modified to indicate the interplay between sentencing guidelines and maximum punishment. Each punitive article should include language that states that if the accused is tried by a general courts-martial, the pun-

ishment shall be in accordance with that directed by R.C.M. 1001-1008 and Appendix 26.

For example, Article 123, forgery, will substitute the following language at paragraph (e), maximum punishment.

(e) *Punishment.*

- (1) If tried before a summary or special courts-martial, the maximum punishment allowed at those forums.
- (2) If tried before a general courts-martial the accused shall be sentenced in accordance with R.C.M. 1001-1008 and Appendix 26 of this Manual.

The above legislative and executive modifications would implement the proposed sentencing guidelines and apply those guidelines to the armed forces. If the above modifications were made, sentencing guidelines would be a part of the military justice system. Once a part of the system, the sentencing guidelines could be studied and monitored to increase their effectiveness.

VIII. Conclusion

Before World War II, military commanders exercised primary control over the military justice system. Today, commanders share control of the military justice system with judge advocates and military judges.⁵⁴⁴ This shared control is an outgrowth of the 1951 *Manual* and the maturing of the military justice system into a modern criminal justice system.

The military justice system has evolved with every change to the *Manual for Courts-Martial*. The system has developed from a system of discipline to a highly developed criminal justice system. What was once a system that focused on crimes unique to the military now includes punitive articles that cover every conceivable crime.⁵⁴⁵

While the military justice system has expanded to a point where almost any criminal conduct is punishable under the *Manual*, the military sentencing system has remained remarkably similar to the system that was in place before World War II. Similarly, while the federal system and a

544. Lovejoy, *supra* note 40, at 5.

545. MCM, *supra* note 16, pt. IV. Not only can the crimes specifically listed in the *Manual* be prosecuted at courts-martial, but, state and federal crimes can be prosecuted under the assimilated crime provision of Article 134.

majority of the states seek sentence uniformity, the military system largely abandoned sentencing uniformity as a goal in the 1950s. Further, where the federal system has implemented sentencing guidelines to control sentencing discretion, the military allows almost unchecked sentencing discretion.

It is curious that the military chooses to cling to its unique method of sentencing at a time when other areas of military justice strive to mirror the federal system.⁵⁴⁶ Congress has directed the President, when practicable, to adopt the practices of the federal criminal justice system.⁵⁴⁷ Adopting military sentencing guidelines would fulfill this mandate.

This article demonstrates that sentence disparity exists within the military sentencing system. Adopting the military sentencing guidelines proposed in this article will decrease sentence disparity. The proposed sentencing guidelines reduce sentence disparity while maintaining, and perhaps enhancing, the positive aspects of the current military sentencing system. The proposed guidelines could be implemented with minor modifications to the existing Rules for Courts-Martial.

Military sentencing guidelines will improve an already effective justice system. This paper proposed a method for establishing military sentencing guidelines. Whether the model proposed by this article, or some other sentencing guidelines system, the military sentencing system can be improved by sentencing guidelines.

546. 10 U.S.C. § 836 (2000). “[The President shall apply where practicable] the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . .” *Id.*

547. *Id.*

Appendix A

Sentencing Table
(in months of imprisonment)

Criminal History Category (Criminal History Points)

| Offense Level | I (0 or 1) | II (2 or 3) | III (4, 5, 6) | IV (7, 8, 9) | V (10, 11, 12) | VI (13 or more) |
|---------------|---------------|----------------|------------------|-----------------|-------------------|--------------------|
| 1 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 |
| 2 | 0-6 | 0-6 | 0-6 | 0-6 | 0-6 | 1-7 |
| 3 | 0-6 | 0-6 | 0-6 | 0-6 | 2-8 | 3-9 |
| 4 | 0-6 | 0-6 | 0-6 | 2-8 | 4-10 | 6-12 |
| 5 | 0-6 | 0-6 | 1-7 | 4-10 | 6-12 | 9-15 |
| 6 | 0-6 | 1-7 | 2-8 | 6-12 | 9-15 | 12-18 |
| 7 | 0-6 | 2-8 | 4-10 | 8-14 | 12-18 | 15-21 |
| 8 | 0-6 | 4-10 | 6-12 | 10-16 | 15-21 | 18-24 |
| 9 | 4-10 | 6-12 | 8-14 | 12-18 | 18-24 | 21-27 |
| 10 | 6-12 | 8-14 | 10-16 | 15-21 | 21-27 | 24-30 |
| 11 | 8-14 | 10-16 | 12-18 | 18-24 | 24-30 | 27-33 |
| 12 | 10-16 | 12-18 | 15-21 | 21-27 | 27-33 | 30-37 |
| 13 | 12-18 | 15-21 | 18-24 | 24-30 | 30-37 | 33-41 |
| 14 | 15-21 | 18-24 | 21-27 | 27-33 | 33-41 | 37-46 |
| 15 | 18-24 | 21-27 | 24-30 | 30-37 | 37-46 | 41-51 |
| 16 | 21-27 | 24-30 | 27-33 | 33-41 | 41-51 | 46-57 |
| 17 | 24-30 | 27-33 | 30-37 | 37-46 | 46-57 | 51-63 |
| 18 | 27-33 | 30-37 | 33-41 | 41-51 | 51-63 | 57-71 |
| 19 | 30-37 | 33-41 | 37-46 | 46-57 | 57-71 | 63-78 |
| 20 | 33-41 | 37-46 | 41-51 | 51-63 | 63-78 | 70-87 |
| 21 | 37-46 | 41-51 | 46-57 | 57-71 | 70-87 | 77-96 |

| | | | | | | |
|----|----------|----------|----------|----------|----------|----------|
| 22 | 41-51 | 46-57 | 51-63 | 63-78 | 77-96 | 84-105 |
| 23 | 46-57 | 51-63 | 57-71 | 70-87 | 84-105 | 92-115 |
| 24 | 51-63 | 57-71 | 63-78 | 77-96 | 92-115 | 100-125 |
| 25 | 57-71 | 63-78 | 70-87 | 84-105 | 100-125 | 110-137 |
| 26 | 63-78 | 70-87 | 78-97 | 92-115 | 110-137 | 120-150 |
| 27 | 70-87 | 78-97 | 87-108 | 100-125 | 120-150 | 130-162 |
| 28 | 78-97 | 87-108 | 97-121 | 110-137 | 130-162 | 140-175 |
| 29 | 87-108 | 97-121 | 108-135 | 121-151 | 140-175 | 151-188 |
| 30 | 97-121 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 |
| 31 | 108-135 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 |
| 32 | 121-151 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 |
| 33 | 135-168 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 |
| 34 | 151-188 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 |
| 35 | 168-210 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 |
| 36 | 188-235 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 |
| 37 | 210-262 | 235-293 | 262-327 | 292-365 | 324-405 | 360-Life |
| 38 | 235-293 | 262-327 | 292-365 | 324-405 | 360-Life | 360-Life |
| 39 | 262-327 | 292-365 | 324-405 | 360-Life | 360-Life | 360-Life |
| 40 | 292-365 | 324-405 | 360-Life | 360-Life | 360-Life | 360-Life |
| 41 | 324-405 | 360-Life | 360-Life | 360-Life | 360-Life | 360-Life |
| 42 | 360-Life | 360-Life | 360-Life | 360-Life | 360-Life | 360-Life |
| 43 | Life | Life | Life | Life | Life | Life |

Appendix B

Proposed Military Sentencing Matrix

| | Category I | Category II | Category III | Category IV | Category V |
|--|--|--|--|--|--|
| Art. 87 Class. 1 Class. 2 | 0-5 0-3 | 6-9 4-5 | 10-17 6-8 | 18-20 9-10 | 21-24 11-12 |
| Art. 89 | 0-3 | 4-5 | 6-8 | 9-10 | 11-12 |
| Art. 90 Class. 1 Class. 2 Class. 3 | 0-17 0-2 0-11 | 18-23 3-5 12-23 | 24-36 6-18 24-59 | 37-47 19-35 60-179 | 48-120 36-60 180-death |
| Art. 111 Class. 1 Class. 2 | 0-3 0-1 | 0-6 0-3 | 3-6 4-5 | 7-12 5-6 | 13-18 5-6 |
| Art. 112a Class. 1(a) Class. 1(b) Class. 2(a) Class. 2(b) | 0-5 0-3 0-11 0-5 | 6-11 1-3 12-23 6-11 | 12-23 4-9 24-48 12-23 | 24-47 10-17 49-119 24-47 | 48-60 18-24 120-180 48-60 |
| Art. 116 Class. 1 Class. 2 | 0-6 0-1 | 7-12 0-3 | 13-24 4-5 | 25-36 5-6 | 37-120 5-6 |
| Art. 118 Class. 1 Class. 2 Class. 3 Class. 4 | Life-death 0-84 0-84 Life-death | Life-death 85-131 85-131 Life-death | Life-death 132-168 132-168 Life-death | Life-death 169-240 169-240 Life-death | Life-death 241-life 241-life Life-death |
| Art. 119 Class. 1 Class. 2 | 0-48 0-12 | 49-56 13-20 | 57-71 21-40 | 72-83 41-72 | 84-180 73-120 |

| | | | | | |
|---|--|--|--|---|--|
| Art. 120 Class. 1 Class. 2 Class. 3 | 0-35 0-59 0-47 | 36-69 60-86 48-79 | 70-87 87-108 80-135 | 88-240 109-120 136-360 | 241-death 121-240 361-life |
| Art. 122 Class. 1 Class. 2 | 0-47 0-17 | 48-62 18-32 | 63-78 33-41 | 79-96 42-60 | 97-180 61-120 |
| Art. 123 | 0-4 | 5-19 | 20-28 | 29-36 | 37-60 |
| Art. 123a Class. 1(a) Class. 1(b) Class. 2 | 0-1 0-5 0-1 | 0-2 6-11 0-2 | 2-3 12-20 2-3 | 3-4 21-36 3-4 | 5-6 37-60 5-6 |
| Art. 124 | 0-19 | 20-29 | 30-37 | 38-48 | 49-84 |
| Art. 125 Class. 1 Class. 2 Class. 3 Class. 4 | 0-35 0-59 0-47 0-6 | 36-69 60-86 48-79 0-12 | 70-87 87-108 80-135 6-18 | 88-240 109-120 136-360 19-24 | 241-life 121-240 361-life 25-60 |
| Art. 126 Class. 1 Class. 2(a) Class. 2(b) | 0-17 0-2 0-11 | 18-23 3-5 12-17 | 24-41 6-8 18-24 | 42-63 9-10 25-36 | 64-240 11-12 37-60 |
| Art. 127 | 0-5 | 6-17 | 18-26 | 27-30 | 31-36 |
| Art. 128 Class. 1(a) Class. 1(b) Class. 2 Class. 3 Class. 4 Class. 5 Class. 6 Class. 7 | 0-1 0-5 0-2 0-6 0-3 0-1 0-7 0-6 | 0-2 6-11 2-3 0-12 0-5 0-3 8-11 7-11 | 1-2 12-17 3-5 12-17 6-8 3-4 12-17 12-16 | 2-3 18-23 4-6 18-24 9-11 4-5 18-23 17-19 | 2-3 24-36 5-6 25-36 12-18 5-6 24-36 20-24 |
| Class. 8(a) Class. 8(b) Class. 9(a) Class. 9(b) | 0-35 0-11 0-59 0-11 | 36-40 12-17 60-77 12-17 | 41-51 18-23 78-97 18-23 | 52-60 24-29 98-110 24-29 | 61-96 30-36 111-120 30-60 |

| | | | | | |
|---------------------|------|-------|-------|-------|--------|
| Art. 129 | 0-11 | 12-23 | 24-30 | 31-60 | 61-120 |
| Art. 130 | 0-5 | 6-9 | 10-16 | 17-36 | 37-60 |
| Art. 131 | 0-2 | 2-5 | 6-9 | 10-16 | 17-60 |
| Art. 134 ¶71 | 0-1 | 0-2 | 2-3 | 4-5 | 5-6 |
| Art. 134 ¶87 | 0-17 | 18-24 | 25-36 | 37-48 | 49-84 |

**MODERNIZING THE MANUAL FOR COURTS-MARTIAL
RULE-MAKING PROCESS:
A WORK IN PROGRESS**

KEVIN J. BARRY¹

I. Introduction

In June 1991, Professor David A. Schlueter gave the Twentieth Annual Kenneth J. Hodson Lecture at the Judge Advocate General's School in Charlottesville, Virginia. He titled his remarks "Military Justice for the 1990's—A Legal System Looking For Respect."² In his lecture, Professor Schlueter noted that, while the system had his "highest respect,"³ questions were continuously being asked, primarily by people outside the system, whether "the military justice system was fair."⁴ Schlueter spent the bulk of his lecture exploring aspects of the system that historically have received the most criticism, those that tended to detract from the respect due the system. In his view, listening to—and attempting to address—criticisms from both within and without the system was "the right thing to do."⁵

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2. David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking For Respect*, 133 MIL. L. REV. 1 (1991).

3. *Id.* at 2.

4. *Id.* at 3.

5. "Those who are within the system should be the first to step forward and make changes where needed. In military jargon, those within the system must be 'proactive,' not 'reactive.'" *Id.* at 10.

The military justice system has changed much in the fifty years since the Uniform Code of Military Justice (UCMJ) was adopted, including in the decade since Professor Schlueter gave his remarks, and thus might itself appropriately be viewed as “a work in progress.” Nevertheless, most of the issues he addressed remain issues today, and virtually all of his recommendations for change⁶ still await implementation.

The military justice system’s susceptibility to criticism, and its striving for a little respect, are, of course, not new. Professor Schlueter was speaking at the annual Hodson Lecture, and spoke in glowing terms of Major General Kenneth Hodson and his contributions not only to the military, but to the “legal profession in general.”⁷ It is worthy of note that, eighteen years earlier, General Hodson himself had authored a law review article⁸ with an almost identical theme: that the administration of criminal justice in the armed forces has been subject to constant criticism, that the system was in need of constant review, and that military justice could be improved by implementing a series of systemic changes. As did Professor Schlueter, General Hodson listed a number of specific changes he proposed. Most, twenty-seven years later, remain unimplemented.⁹

6. Some of Schlueter’s concerns were more philosophical and perhaps can be best addressed by training and open discussion. For example, he raised the issue of whether the principal purpose of the military justice system is discipline or justice. *Id.* at 10-13. Other concerns went beyond mere thoughtful analysis and included recommendations, such as increasing the number of members on a general court-martial panel to six (and for capital cases to twelve), and reevaluating the “most vulnerable aspect” of the system: the process of selecting members of court-martial panels. Schlueter suggested, *inter alia*, that “the role of the prosecutor and the commander in the selection process should be reduced, if not eliminated.” *Id.* at 18-20. Schlueter’s entire article is worthy of careful scrutiny by anyone considering the future of the military justice system.

7. *Id.* at 1. General Hodson was a former The Judge Advocate General of the Army, and Chief Judge of the Army Court of Military Review. He was very active in the American Bar Association (ABA), and was a driving force behind the establishment of the ABA Government and Public Sector Lawyers Division. The author is aware of no other military lawyer who has contributed as much to the profession or who is more highly respected.

8. Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973) reprinted in MIL. L. REV. BICENT. ISSUE 577 (1975).

9. As Schlueter also did in 1991, General Hodson in 1973 addressed the “discipline vs. justice” issue, finding that the justice system will enhance discipline to the degree that it does—and is perceived to do—justice. *Id.* at 584-90. He too focused on the multiple roles of the convening authority, command influence, and the independence and impartiality of judges, defense counsel, and juries from command influence. Among Hodson’s seven recommendations, three have been, at least to some degree, implemented:

Today, the military justice system still seeks respect. Criticism and questions about the fairness of the system have taken on a new life in the last few years, fired in part by the *Tailhook* incident and its aftermath, and later by the sex-scandals and the various investigations surrounding the drill instructors at Aberdeen, the Kelly Flinn case, and more recently the court-martial of Sergeant Major of the Army Eugene McKinney and the handling of the case of Major General David R. Hale. In sum, these cases have raised questions about whether the military trial process itself is fair. More significantly, they have questioned the overall system and its administration, and whether the process is evenly applied. There can be no doubt: the questions raised concerning the fairness of this system go well beyond perception alone, and they are not frivolous.¹⁰

One aspect of the system that bears decidedly on these perceptions of fairness has received considerably less attention than such issues as the

9. (continued)

- (4) an accused . . . be permitted to petition the Supreme Court for a writ of certiorari;
- (5) defense counsel be made as independent of command as possible . . . ;
- (6) adequate administrative and logistical support be provided to permit the military judiciary to function independently and efficiently.

The remaining four recommendations have not been implemented:

- (1) military juries be randomly selected;
- (2) military judges of general courts-martial (as well as military appellate judges) be appointed by the President to permanent courts for a term of years [and be given all writs authority, full sentencing authority, and contempt powers] . . . ;
- (3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence; . . .
- (7) commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty.

Id. at 605.

10. An indication of the seriousness of the issues came on 12 February 1998, when a seminar co-sponsored by the National Institute of Military Justice was held in Washington, DC, at which a distinguished panel of military law experts, including a former Chief Judge of the Court of Appeals for the Armed Forces, assembled to debate the question "Can

independence of military judges, the various roles of the convening authority, or the manner in which military juries are selected. This is the crucially important issue of the method by which amendments to the *Manual for Courts-Martial (MCM or Manual)* are proposed, considered, and adopted. It is not a new issue, having been raised at least as long ago as 1973 by General Hodson (as the third of his seven proposed changes).¹¹ As will be discussed more fully below, the concerns focus on the lack of representation from the bench, the bar, academia, and the public on the committee preparing the proposed rule changes, and from the fact that the procedures used by that committee are not the type of open and public rule-making procedures that are established for the federal rule-making process, which are designed to instill public confidence in the process, and to insure that the best possible rules are adopted. In short, the *perception* that the process has too often left is that of a small “government” committee, operating in secret, which changes the rules (often with the appearance of benefiting only the prosecution) without explaining why. In part because of this negative perception, the subject of the *MCM* rule-making process has been much more in the forefront in the last few years. The active consideration given the rule-making process has resulted in a series of improvements in the last decade, with very significant changes being recently implemented in February of 2000, which address and resolve *some* of the longstanding concerns.

This article discusses the rule-making process in general, and traces developments over the last two decades. It reviews two recent recommendations for change arising from critical assessments of the current practice by the American Bar Association (ABA) in 1995 and 1997,¹² the first of which has largely been implemented by the recent changes. It compares the latter recommendation, which has not been adopted, with the almost

10. (continued) You Get a Fair Trial in the Military?” See MIL. JUST. GAZ., No. 54 (Mar. 1998). This seminar was followed six months later by another seminar with an equally distinguished panel at the Annual Meeting of the ABA in Toronto on 1 August 1998, entitled “A Retrospective: After Fifty Years under the UCMJ—Is There Justice in the Military?” No other system of justice in this country is subject to such a persistent need to defend its fundamental fairness.

11. General Hodson’s third recommendation called for a complete change to the practice of adopting rules of evidence, practice, and procedure: “(3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence.” Hodson, *supra* note 8, at 605. General Hodson’s recommendation is further discussed *infra* at notes 126-145 and accompanying text.

12. See *infra* notes 70-81 and accompanying text (1995 Recommendation) and notes 100-125 and accompanying text (1997 Recommendation).

identical, but not so recent, recommendation for change made by General Hodson in 1973.¹³ It concludes by calling for continued study with a view to implementing General Hodson's 1973 recommendation, thus further advancing this "work in progress"—the modernization of the military court rule-making process.

II. The Historical View: *MCM* Rule-making 1950-1994

Military court rule making has evolved from being a system that was almost entirely invisible from outside the government to a system that, in 2000, is much more in line with the type of notice and comment rule making common to other federal entities. To understand the current status, and the reason why further evolution is desirable, a brief review of the last half-century is warranted.

A. Statutes and Regulations—the UCMJ and the *MCM*

The military justice system in the United States is governed by two primary authorities. The UCMJ¹⁴ sets out the system's basic statutory structure, and the *MCM* is the UCMJ's principal implementing regulation. Under Article 36 of the UCMJ, the President may prescribe regulations governing "pre-trial, trial, and post-trial procedures, including modes of proof" for cases tried before courts-martial, and certain other military tribunals.¹⁵ The first *MCM* under the UCMJ was promulgated by Executive Order 10214 on 8 February 1951, "prescribing the *Manual for Courts-*

13. See *supra* note 11.

14. The UCMJ is codified at 10 U.S.C. §§ 801-946 (2000).

15. UCMJ art. 36 (2000). The President may prescribe rules:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

Martial, United States, 1951.” Frequently amended and revised,¹⁶ the *MCM* remains the principal source book—the “*sine qua non*” for those involved in any way with the court-martial process. It is the indispensable authority for determining the rules of practice, procedure, and evidence applicable not only at trials by court-martial, but throughout pre- and post-trial processing as well, and its importance in the operation of the military justice system can hardly be overstated.¹⁷

Because of their profound impact on the system, it seems axiomatic that the rules and regulations in the *Manual* should be the best possible

16. The 1951 *Manual for Courts-Martial (1951 MCM)* frequently has been revised and amended since that time. Major amendments to the UCMJ contributed to the issuance of a “new” (looseleaf format) *MCM* in 1969 (which was shortly revised to address statutory amendments). The 1969 *Manual* replaced the hardbound 1951 *Manual*, which had been updated frequently by “cut and paste” insertions into the hardbound book. The 1969 *MCM* (Revised Edition) was replaced by another looseleaf format edition in 1984 (1984 *MCM*), which both greatly changed the *MCM* by adopting Rules for Courts-Martial, and responded to the second major statutory amendments to the UCMJ enacted in 1983. In 1994, a soft-cover bound volume *MCM* replaced the 1984 looseleaf edition (1984 *MCM* (1994 Ed.)). The new format allowed for a reissuance of the entire *Manual* upon amendment, and the *MCM* has been twice reissued, once in 1995, when the reference to the 1984 *MCM* was dropped (1995 *MCM*), and most recently in 1998 (1998 *MCM*). A new 2000 edition is in production.

As originally issued in 1951, the *MCM* was, in its entirety, a regulation issued pursuant to presidential authority, and thus the entire *Manual* “had the force of law.” 1 GILLIGAN & LEDERER, COURT-MARTIAL PROCEDURE, ¶ 1-54.00 at 29 (2 ed. 1991). Since 1984, the *MCM* has consisted not only of regulations so issued, but of additional “illustrative” (non-binding) materials as well. *Id.* Examples of non-binding materials are the “Discussions” accompanying the Rules for Courts-Martial, and many of the Appendices (e.g., Appendix 21 containing the “Analysis of the Rules for Courts-Martial,” which appeared first in 1984, and Appendix 22 containing the “Analysis of the Military Rules of Evidence,” which appeared first in 1980).

17. One recent commentator has again noted that the *MCM* was long ago dubbed the military lawyer’s “Bible” by the Court of Military Appeals. Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 97 (1999). Two recent cases highlight its overarching importance. *Loving v. United States*, 116 S. Ct. 1737 (1996), affirmed the viability of aggravating factors and procedures for awarding the death sentence, which are established not by statute but by regulations promulgated pursuant to Article 36. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004, R.C.M.1004 Analysis, app. 21 at A21-A69 (1998) [hereinafter *MCM*]. A more telling case for the importance of *MCM* rules is *United States v. Scheffer*, 118 S. Ct. 1261 (1998), in which the issue was the viability of Military Rule of Evidence (MRE) 707, a rule prohibiting polygraph evidence in courts-martial that was adopted under the military rule-making procedures discussed in this article. The Supreme Court overturned the decision of the Court of Appeals for the Armed Forces, and upheld the MRE. In so doing, the Court noted the “broad latitude” that the rule makers have to make rules, even though those rules

rules that can be adopted, carefully arrived at through a *process* that inspires public confidence by its openness and by the assurance that all relevant viewpoints are effectively heard and considered. Individual rules, once adopted, may not always be viewed as the “best” rules possible: the same rule might be viewed as overly harsh or overly intrusive by some, while others may view it as not being sufficiently rigorous to preserve the commander’s authority and good order and discipline. Accordingly, it is of crucial importance that the *process* used for adopting the rules have fundamental integrity and be uniformly viewed as appropriate and fair. Regrettably, despite small changes to improve the process over the years,¹⁸ the *MCM* rule-making process has for many years been subjected to criticism for falling well short of this standard.¹⁹

B. Rule-making under the UCMJ—the First *MCM*

The first *Manual* issued under the UCMJ (*MCM 1951*) was drafted by “a committee representing all three [Army, Air Force, and Navy] services,”²⁰ under the leadership of Major General Charles Decker, Judge Advocate General’s Corps (JAGC), U.S. Army, who had also been in charge of drafting the Army’s 1949 *MCM* implementing the 1948 amendments to the Articles of War.²¹ The effective date of the UCMJ had been put off for a year to allow sufficient time to prepare the *MCM*. Colonel Frederick Wiener, a leading commentator of the time, believed that the one-year period would be “barely enough to formulate rules, iron out differences between the services, and print and distribute the new Book.”²² In

17. (continued) excluded evidence, so long as the rules were not “arbitrary” or “disproportionate to the purposes they are designed to serve.” *Id.* at 1264. Had the rule been written to *allow* polygraph evidence, the Supreme Court would likely have upheld that rule as well. The dissent noted that the rule was a violation of Article 36(a) in that it was not consistent with the Federal Rules, and there was no special military concern that justified a different rule. *Id.* at 1271-72 (Stevens, J., dissenting). One can only wonder whether the rule might not have been different had it been subjected to an open and public rule-making process, before a more balanced rule-making committee than the Joint Service Committee (JSC) (*see infra* notes 26-35 and accompanying text). Interestingly, the issue of how much (or, rather, how *little*) weight ought to be given to this rule, because of the deficient process under which it was adopted, was not argued to the Court.

18. *See infra* notes 53-61 and accompanying text.

19. The recommendations for positive change addressed below (*see infra* notes 70-81 and accompanying text and notes 100-125 and accompanying text) resulted from a careful review of these criticisms.

20. FREDERICK BERNAYS WIENER, *THE UNIFORM CODE OF MILITARY JUSTICE 2* (1950).

21. 1 GILLIGAN & LEDERER, *supra* note 16, ¶ 1-54.00 at 28, n.142.

fact, the committee completed its work by early 1951, well within the year, and on 8 February 1951, President Truman signed Executive Order 10214 promulgating the *Manual*. The *MCM 1951* was not, of course, drawn from whole cloth, as there had been numerous editions of the *Manual* promulgated under the Articles of War, and the format of the new *MCM* followed that of the earlier *Manuals*. It thus “appears . . . that the current *Manual* is descended directly from the Army’s” edition of the *Manual for Courts-Martial*, first appearing under that name in 1895, and several times revised through the years, most recently in 1949.²³ There is no indication that the *MCM 1951* was in any way made available for review or comment by persons or entities outside the government prior to its adoption.

From 1951 until the first major revision of the *MCM* in 1969, changes to the *Manual* were promulgated by executive order as “cut and paste” changes to the hardbound *MCM 1951*. These changes were prepared within the DOD, and seemingly were also not made available for review or comment outside the government. In the early years of the UCMJ, there was significant civilian interest in the military justice system, and there was notable input by civilian groups into the *legislative* process affecting statutory changes to military justice.²⁴ However, there seems to be no evidence of a similar interest or participation in the rule-making process. This situation apparently persisted throughout most of the period that the *MCM 1951* remained in effect. However, by the time of adopting the new loose-leaf format of the *MCM* in 1969, which implemented major changes to the system enacted in the Military Justice Act of 1968,²⁵ changes in the process for adopting *MCM* changes were in the works.

C. The Joint Service Committee

The process of amending the *MCM* became more formal in 1968 with the formation within the Department of Defense of “The Standing Committee on Keeping the *Manual for Courts-Martial* Current.”²⁶ During 1971-1972, this Committee produced one set of changes to the 1969

22. WIENER, *supra* note 20, at 2. The UCMJ was enacted on 5 May 1950, and was to become effective on 31 May 1951.

23. 1 GILLIGAN & LEDERER, *supra* note 16, ¶ 1-54.00 at 27 n.138; WIENER, *supra* note 20, at 2.

24. See, e.g., Joseph E. Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG. J. 125 (1969) reprinted in MIL. L. REV. BICENT. ISSUE 273 (1975).

25. Pub. L. No. 90-632, 82 Stat. 1335 (1968).

26. CHARTER OF THE JOINT-SERVICE COMMITTEE ON MILITARY JUSTICE 1 (1972).

MCM.²⁷ In 1972, the name of the Committee was changed to the “Joint-Service Committee on Military Justice” (JSC), the name the Committee retains to this day, and its duties were expanded to include recommending proposed changes to the UCMJ.²⁸ The Committee remained comprised of “representatives of the Judge Advocates General and of the General Counsel of the Department of Transportation [for the Coast Guard], with the chairmanship rotating biennially among the Services,” and with an executive secretary provided by the Chairman’s service.²⁹ Shortly after the JSC’s inception, the Marine Corps began to provide a representative, and in 1977 a “non-voting representative” of the Court of Military Appeals began to sit with the JSC.³⁰ Later, a non-voting representative from the DOD was also added.³¹

The JSC 1980 operating procedures provided for an orderly process of committee meetings with advance written notice, a formal agenda, and advance distribution of proposals on which votes would be taken. The JSC was limited to one of four actions on proposals: (1) decline to consider as not within the Committee’s cognizance; (2) reject the proposal; (3) table the proposal (six months maximum before either acceptance or rejection was required); or (4) accept the proposal and assign it a priority of three months, six months, or one year for completing action.³² Proposals in almost all circumstances had to be in writing; could be submitted only by the Code Committee, members of the JSC, or those they represented; and were required to contain “a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem.”³³ Files on all proposals and of all minutes of meetings were required to be maintained. A “working group” of representatives from each of the five services assisted the JSC by taking the action required to prepare proposals for further consideration and implementation.³⁴

27. *Id.*

28. *Id.*

29. *Id.*

30. JOINT SERVICE COMMITTEE ON MILITARY JUSTICE FUNCTION AND OPERATING PROCEDURE 1 (1980) [hereinafter JSC 1980 PROCEDURES].

31. Though the DOD representative began to sit much earlier, the first official mention came in 1996. DOD DIRECTIVE 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE, at E1.1 (May 8, 1996) [hereinafter 1996 DOD Directive].

32. JSC 1980 PROCEDURES, *supra* note 30, at 2.

33. *Id.* at 3.

34. *Id.* at 1.

The operation of the Joint Service Committee has remained largely unchanged from 1980 to the present and, as described in one leading work, the composition and operation affect the resulting proposed rules, as well as the potential to adopt potentially controversial rules:

The *Manual* is kept current by the Joint Service Committee on Military Justice. This is a committee consisting of the officers responsible for criminal law in the armed forces (including the Coast Guard), augmented by representatives from the Department of Defense General Counsel's Office and the Court of Military Appeals. This body serves primarily as a policy-making one. The actual drafting work is customarily done by the Joint Service Committee on Military Justice Working Group, consisting of subordinates of the Committee's members. Changes may be initiated by the Working Group or drafted in response to the Committee's direction. No amendment is usually possible, however, without Committee endorsement. Proposed *Manual* changes must be coordinated with the Department of Transportation (because of the Coast Guard), the Attorney General and OMB. The President of course has the final decision. Changes in the *Manual* are inherently political, and absent unusual political machination, no change is likely to be made that does not have substantial backing, if not full consensus.³⁵

D. Military Rules of Evidence—Public Comment

The 1980 operating procedures did not provide for input to the process, or review of proposals for change, except within the JSC and by the parties represented on the JSC (and later by DOD and OMB during the process for approval of an Executive Order). The process is exemplified in the adoption of the Military Rules of Evidence in 1980, at the time the most important change to the *MCM* to be considered since its inception. The Federal Rules of Evidence had recently been adopted, and there was a proposal under development to completely restructure the *MCM* provisions on evidence by adopting Military Rules of Evidence patterned closely on the Federal Rules. The detailed and structured process followed is described in the current *MCM*:

The Military Rules of Evidence, promulgated in 1980 as Chapter XXVII of the Manual for Courts-Martial, United States,

35. 1 GILLIGAN & LEDERER, *supra* note 16, ¶ 1-54.00 at 30 n.148.

1969 (Rev. ed.), were the product of a two year effort participated in by the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation. The Rules were drafted by the Evidence Working Group of the Joint Service Committee on Military Justice, which consisted of Commander James Pinnell, JAGC, U.S. Navy, then Major John Bozeman, JAGC, U.S. Army (from April 1978 to July 1978), Major Fredric Lederer, JAGC, U.S. Army (from August 1978), Major James Potuk, U.S. Air Force, Lieutenant Commander Tom Snook, U.S. Coast Guard, and Mr. Robert Mueller and Ms. Carol Wild Scott of the United States Court of Military Appeals. Mr. Andrew Effron represented the Office of the General Counsel of the Department of Defense on the Committee. The draft rules were reviewed and, as modified, approved by the Joint Service Committee on Military Justice. Aspects of the Rules were reviewed by the Code Committee as well. See Article 67(g) [now Article 146]. The Rules were approved by the General Counsel of the Department of Defense and forwarded to the White House via the Office of Management and Budget which circulated the Rules to the Departments of Justice and Transportation.

The original Analysis was prepared primarily by Major Fredric Lederer, U.S. Army, of the Evidence Working Group of the Joint Service Committee on Military Justice and was approved by the Joint Service Committee on Military Justice and reviewed in the Office of the General Counsel of the Department of Defense.³⁶

Though not reflected in the above comment, there was some (minimal) public input into the process of adopting the Military Rules of Evidence, but this was hampered by the absence of explanatory material. Mr. Eugene R. Fidell, a noted practitioner and commentator on military justice stated:

Copies of the first, and much larger, of the two sets of changes were circulated informally by the executive branch to a few members of the public who had expressed an interest. . . . [How-

36. "Analysis of the 1980 Amendments to the *Manual for Courts-Martial*." See MCM, *supra* note 17, app. 22, at A22-1.

ever, DOD] did not release an analysis of the changes until many months after [the Rules] had been signed by President Carter.³⁷

Due to the volume of the changes, *and the absence of any explanatory material*, Mr. Fidell concluded that, “[n]ot surprisingly, few members of the bar commented.” He lamented that the “executive branch has declined to release the Justice Department’s correspondence regarding the Military Rules of Evidence.”³⁸

Indeed, this denial of documents is indicative of a larger concern, which has been a constant source of frustration and criticism over the past two decades. As expressed by Mr. Fidell,

there appears to be a regrettable lack of interest on the part of some persons within the system of military justice in obtaining and considering the views of the bar on matters of military law. The consequence is that the system has tended to be more insular than can be justified. This is particularly inappropriate because military law frequently draws on civilian doctrines. Indeed, Congress has directed that the rules of procedure and evidence in courts-martial should be the same, to the extent practicable, as those applied in the trial of criminal cases in the federal district courts. Clearly the civilian bar has much to contribute to a system so closely tied to the civilian federal model.

....

The Military Rules of Evidence were generated by an “Evidence Working Group” of the Joint-Service Committee on Military Justice. That group . . . met in secret for many months. With the exception of its “charter” and operating procedures, the papers of the joint-service committee have been withheld from public disclosure under the Freedom of Information Act.³⁹

37. Eugene R. Fidell, *Military Justice: The Bar’s Concern*, 67 A.B.A. J. 1280 (1981).

38. *Id.*

39. *Id.* at 1280-82. The records of the JSC remain unavailable even to this day: “As internal working documents, these records are exempt from disclosure under the Freedom of Information Act.” INTERNAL ORGANIZATION AND OPERATING PROCEDURES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE III.F. (Initially adopted Feb. 3, 2000, corrected and readopted Mar. 2, 2000) [hereinafter JSC 2000 PROCEDURES]. These newly adopted JSC procedures are further discussed *infra*, and because of their importance are reproduced in their entirety in the Appendix. *See infra* notes 90-99 and accompanying text.

Others have noted the contrast between the process of adopting the Military Rules of Evidence and the process used to adopt equivalent federal civilian rules: "Unlike the process used for adopting the Federal Rules [of Evidence], the procedure here did not generally involve widespread public input."⁴⁰ This observation actually seems to be a marvel of understatement.

E. Federal Register Notice

The absence of notice to the public and an opportunity to comment on proposed changes to the *MCM* was a subject of enough serious concern that, in 1981, the American Bar Association adopted a recommendation urging that "in peacetime, all proposed changes to the *Manual for Courts-Martial* [sic] should be published in proposed form in the *Federal Register*, and a period of at least sixty days thereafter be allowed for public comment in most cases."⁴¹ Full text publication of the proposed changes was opposed by DOD, but in early 1982 DOD agreed to publish "notice" of proposed *MCM* changes "in the *Federal Register* before submission of such changes to the President."⁴² The notice would provide a brief description of the matters contained in the proposed change, information on where a copy of the proposed change could be examined, information on how the public could obtain copies of the full text of the changes, and a seventy-five day waiting period to allow for public comment.⁴³ Thus, after more than thirty years under the UCMJ, and after a mammoth change effecting a complete redesign of the rules of evidence, interested persons outside the government were, for the first time, formally allowed a role

40. SALTZBURG ET AL., *MILITARY RULES OF EVIDENCE MANUAL* xi (1997). The federal (civilian rules) process is described in detail below. *See infra* notes 132-137 and accompanying text.

41. AMERICAN BAR ASSOCIATION, *POLICY AND PROCEDURES HANDBOOK* 286 (1997-1998 ed.) [hereinafter *ABA HANDBOOK*].

42. 47 Fed. Reg. 3401 (1982).

43. *Id.* The full text of the policy read as follows:

Notice that the Department of Defense intends to recommend changes to the *Manual for Courts-Martial* shall be published in the *Federal Register* before submission of such changes to the President unless the Secretary of Defense proposes that the President issue the change without such notice on the basis that notice and public procedure thereon is unnecessary or contrary to the sound administration of military justice. The notice shall include a brief description of the matters contained in the proposed change, the time and place where a copy of the

(albeit quite minimal) in the rule-making process. However, the failure to require explanatory material and analysis of the proposed changes would continue to hamper the exercise of the new opportunity to comment.

F. Codification of the Rule-making Process

From 1980 to 1984, a major revision of the *MCM* was undertaken. The task fell to the JSC Working Group, under the Chairmanship of (then) Major John S. Cooke, JAGC, USA.⁴⁴ The end result, including the transition to Rules for Courts-Martial from the prior narrative format, and the adoption of numerous changes to meet the substantial changes effected by the Military Justice Act of 1983, was promulgated on 23 April 1984, with minor modifications signed on 13 July 1984.⁴⁵

In promulgating this, the most far-reaching change to the contents and format of the *MCM* since 1951, the President added a requirement that the “Secretary of Defense shall cause this *Manual* to be reviewed annually and shall recommend to the President any appropriate amendments.”⁴⁶ To implement this “annual review” requirement, a DOD Directive (5500.17) was promulgated on 23 January 1985, and was thereafter (on 14 February 1985) incorporated as a final rule at 32 C.F.R. Part 152.

The rule formally assigned responsibility for preparation of the annual review to the JSC. Under the rule,⁴⁷ the JSC is required to send to

43. (continued)

proposed change may be examined, and the procedure for obtaining a copy of the proposed change. A period of not less than 75 days after publication of notice shall be allowed for public comment, but a shorter period may be prescribed when it is determined that a 75-day period is unnecessary or contrary to the sound administration of military justice. Comments shall be submitted to the Joint-Service Committee on Military Justice. This section is intended only to improve the internal management of the federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

44. Analysis of the Rules for Courts-Martial. See *MCM*, *supra* note 17, app. 21 at A21-1.

45. Exec. Order No. 12473, 49 Fed. Reg. 17,152 (Apr. 23, 1984), *as modified*, Exec. Order No. 12484, 49 Fed. Reg. 28,825 (July 13, 1984).

46. *Id.*

47. Although the DOD Directive was revised in 1996, it is the superseded 1985 rule, which remains codified at 32 C.F.R. Part 152. See *infra* notes 82-89 and accompanying text.

the general counsel its draft review by February first of each year.⁴⁸ If changes are recommended, then the public notice provisions of the rule become effective.⁴⁹ The rule codifies without change the public notice provisions of the 1982 DOD policy statement,⁵⁰ thus providing only “notice” of proposed changes rather than the full text of those proposed changes.⁵¹ This rule left unaddressed, and thus unchanged, the internal operating procedures of the JSC previously adopted.⁵²

G. Years of Transition: 1985-1994

In each of the years between 1985 and 1994, the JSC conducted an annual review and proposed changes to the *MCM*. In each of the years through 1993, the JSC published a *notice* in the Federal Register pursuant to Part 152, with a brief summary of the proposed changes and information as to availability. As proposed executive orders were processed through to signature by the President, the executive order implementing the changes—with the full text of the “mandatory” changes—was published in the Federal Register.⁵³ It is interesting to note that, for the first four such Amendments (1986, 1987, 1990, and 1991), *only* the actual text of the executive order itself—promulgating the changes to the “mandatory” sections of the *MCM*—was published in the Federal Register,⁵⁴ and the non-binding (but extremely important⁵⁵) changes to the Discussion and Analy-

48. 32 C.F.R. § 152.4(a)(3) (2000).

49. *Id.* § 152.4(a)(4).

50. *See supra* notes 42-43.

51. For an example of such a notice, see Manual for Courts-Martial, Notice of Proposed Amendment, 51 Fed. Reg. 31,164 (1986).

52. *See* JSC 1980 PROCEDURES, *supra* note 30, and accompanying text.

53. Draft executive orders prepared by the JSC are first reviewed within the Department of Defense. Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon, DOD Directive 5500.1 (May 21, 1964). Thereafter they are transmitted to the Office of Management and Budget (OMB) for review and approval. Once approved by OMB, they are transmitted to the Department of Justice (DOJ) for review as to both form and legality, and if approved they are then sent to the Office of the Federal Register for review as to proper form and absence from clerical error. Finally, if cleared by each level, the executive order is sent to the White House for [review and] presentation to the President. 1 C.F.R. pt. 19 (2000).

54. *See* Exec. Order No. 12,550 (Feb. 19, 1986), 51 Fed. Reg. 6497; Exec. Order No. 12,586 (Mar. 3, 1987), 52 Fed. Reg. 7103; Exec. Order No. 12,708 (Mar. 23, 1990), 55 Fed. Reg. 11353; Exec. Order No. 12,767 (June 27, 1991), 56 Fed. Reg. 30284.

55. The military appellate courts have frequently cited and relied on the analysis or discussion in ruling on a case. *See, e.g.*, United States v. Johnston, 41 M.J. 13, 16 (C.M.A. 1994); United States v. Stringer, 37 M.J. 120, 131 (C.M.A. 1993).

sis sections were not published. Thereafter, starting in 1993, all Federal Register publications of *MCM* Amendments have included not only the mandatory changes contained in the executive order itself, but the non-binding portions as well.⁵⁶ Obviously, the looseleaf "Changes" to the *MCM* (which were prepared and distributed to be used to update the many copies of the *MCM* in use) necessarily included *all* the changes which affected the *MCM*, both the "mandatory" sections *and* the Discussion and Analysis, without which the *MCM* would be not only incomplete, but also difficult to impossible to comprehend or use in many cases.

During this same period, a much more significant change to the process was quietly made, again without explanation. On 14 April 1993, the JSC published the usual notice of proposed amendments resulting from the annual review, with the usual summary and notice of availability of copies of the text of the proposed changes.⁵⁷ What is remarkable is that on the very next page of the Federal Register appeared a "notice of public meeting" at which "the JSC will receive public comment concerning its 1993 Annual Review of *Manual for Courts-Martial, United States, 1984*, as published on April 14, 1993."⁵⁸ The JSC had never held a public meeting. In fact, its meetings had always been closed and its agenda had never been published. The only authority cited in the notice was "Department of Defense Directive 5500.17 of January 23, 1985," a document which does not either authorize or require public meetings. Since this first public meeting in 1993, public meetings of the JSC have been held in conjunction with every subsequent proposed rule change that has been advanced.

The following year another remarkable event occurred, again without notice or explanation. On 14 April 1994, the JSC published its usual "notice of proposed amendments" resulting from the 1994 annual review⁵⁹ and, as it did the year before, a "notice of public meeting" of the JSC.⁶⁰ The difference was that the notice of proposed amendments, instead of providing the usual (and, by regulation, required) *summary*, contained the

56. See, e.g., Exec. Order No. 13,140 (Oct. 6, 1999), 64 Fed. Reg. 55,115; Exec. Order No. 12,888 (Dec. 23, 1993), 58 Fed. Reg. 69,153. No comment or explanation was offered either as to the fact that there was a change to the publication policy or as to the reason for the change.

57. Notice of Proposed Amendments, 58 Fed. Reg. 19,409 (1993).

58. *Id.* 19,410.

59. 59 Fed. Reg. 17,771 (1994). The only citation of authority was the usual one: "This notice is provided in accordance with DOD Directive 5500.17, 'Review of the Manual for Courts-Martial,' January 23, 1985."

60. 59 Fed. Reg. 17,772.

full text of all the changes, including the non-binding changes to the analysis and discussion. The JSC had finally, thirteen years later, acceded to the bar's recommendation for full-text publication.⁶¹

These three changes in the process—(1) publication of the *entire MCM* amendments (including discussion and analysis along with the mandatory portions) in the executive order in 1993, (2) holding public meetings of the JSC that same year to receive public comment on proposed changes, and (3) full text publication of the *proposed changes* to the *MCM* in 1994—were a direct result, in the opinion of one knowledgeable observer, from the fact that there was critical public review and comment on the *MCM* rule-making process from civilians *outside* the DOD.⁶² The conclusion that civilian bar influences played a substantial part in DOD's reconsideration of the *MCM* rule-making process are likely on target. Particularly during the early 1990s, the interest of the bar became more visible, and with it came markedly increased critical evaluation and recommendations for change in the *MCM* rule-making process.

For example, the education process and the ready availability of information regarding the military justice system increased dramatically after the founding of The National Institute of Military Justice (NIMJ), an independent non-profit organization, in 1991,⁶³ and the appearance of NIMJ's informational newsletter, the *Military Justice Gazette*, which typically includes notices regarding items of interest and proposed changes concerning the military justice system.⁶⁴ In addition, the American Bar Association Standing Committee on Military Law (SCML)⁶⁵ continued its

61. The ABA had first sought full-text publication in August 1981. *See supra* note 41 and accompanying text.

62. "Civilian interest, involvement, and monitoring of proposals for change were the catalyst for the changes in the process of rule-making, and without that outside involvement, the changes in the process would never have occurred." Telephone Interview with John B. Holt, Commissioner, U.S. Court of Appeals for the Armed Forces (Feb. 25, 2000). Mr. Holt served as the court's non-voting representative to the JSC during much of the period in question.

63. NATIONAL INSTITUTE OF MILITARY JUSTICE, SUMMARY OF ACTIVITIES 1991-1998 AND FUTURE PLANS 13 (1998).

64. For example, the first issue of the *Military Justice Gazette* in February 1992 noted the availability of the Annual Report of the Code Committee on Military Justice. *See MIL. JUST. GAZ.* No. 1 (Feb. 1992). The first public meeting of the JSC received lengthy comment in the *Military Justice Gazette*. *See MIL. JUST. GAZ.* No. 9 (May 1993). Proposed changes to the *MCM* or UCMJ received comment in a variety of early issues. *See, e.g., MIL. JUST. GAZ.* No. 5 (Jan. 1993) (discussing Change to R.C.M. 1112 and 1201(b) in ABA Recommendation 107A); *MIL. JUST. GAZ.* No. 3 (Aug. 1992).

longstanding focus on the rule-making process,⁶⁶ asking challenging questions⁶⁷ and later sponsoring recommendations concerning the system.⁶⁸ In addition, individual members of the bar were proposing changes to *MCM* provisions and raising questions regarding the *MCM* rule-making process.⁶⁹

65. In August 1994, the Standing Committee on Military Law (SCML) was merged with the Standing Committee on Lawyers in the Armed Forces (SCLAF) to create the currently active Standing Committee on Armed Forces Law (SCAFL).

66. Involvement of the SCML as early as 1979 has been noted: "The need to involve individuals and groups outside the Department of Defense in revisions of the *Manual for Courts-Martial* was emphasized in 1979 by the American Bar Association Standing Committee on Military Law." Fidell, *supra* note 37, at 1282. The same concerns regarding the need for meaningful public comment that were expressed by Mr. Fidell in 1981 were repeated in reports accompanying recommendations adopted by the ABA in 1995 and 1997, as are further addressed below.

67. See, e.g., Letter from Keith E. Nelson to Stephen W. Preston (Acting General Counsel, DOD) (May 26, 1994). Major General Nelson, a retired Judge Advocate General of the Air Force, was serving as Chair of the SCML and addressed the difficulties that the SCML had experienced in reviewing proposed changes (Change 9) to the *MCM*: "[O]ur efforts were again hampered by the absence of an understanding of the reasons for the changes which were being proposed." *Id.* Major General Nelson noted that the presence of two members of the JSC that had adopted the proposed changes at the SCML meeting was not helpful, for

due in part to the passage of time since they had considered the issues, they were not able to enlighten the Committee as to the problems which were intended to be corrected by these changes. The discussion made crystal clear the need for a more comprehensive assessment and analysis to be published along with the proposed changes so that they can be better understood, and so that this Committee, and all others who might wish to review and comment on such changes, can do so intelligently.

Id. Major General Nelson went on to detail flaws in the rule-making process, and to call for substantial change, essentially along the lines later adopted by the ABA in Recommendation 115. See *infra* notes 70-81 and accompanying text. In her response, the DOD General Counsel listed the steps in the current process, and indicated an interest in increased public participation, but saw this as being accomplished in conjunction with "continue[d] operations within our current framework." Letter from Judith A. Miller to Major General Keith E. Nelson (Ret), at 3 (Nov. 18, 1994). Despite the fact that full-text publication of proposed changes had already been done in 1994, the general counsel indicated that only a summary need be published: "[O]ur procedures do not provide for full text publication." *Id.* at 2. Notwithstanding the absence of any authorizing "procedures," her list *did* include holding a public hearing. *Id.* In fact, such meetings had already been held twice, in 1993 and 1994.

68. Later initiatives by the ABA and SCAFL are further discussed below. See *infra* notes 70-81 and accompanying text and notes 100-125 and accompanying text.

69. See, e.g., MIL. JUST. GAZ. No. 10 (June 1993) (including the May 14, 1993 Code

III. Recent Changes Responsive to ABA Recommendations

It is safe to say that in the period from 1994 to the present, there has been more attention given to the process of military court rule making than at any time in the preceding forty-five years. The period saw two major ABA Recommendations for substantial change in that process, one of which (Recommendation 115 in 1995) was largely implemented by DOD in 2000, almost exactly five years after its adoption by the ABA House of Delegates. The second ABA Recommendation (100 adopted in 1997) has not yet been implemented; it will be addressed below.

A. 1995—Recommendation 115

The letter of SCML chair General Nelson to the DOD acting general counsel in 1994⁷⁰ was one of the early steps in an increasing dialog between the ABA Committees and representatives of the DOD and the JSC on the rule-making process. Later, in 1994, the SCML was merged with the Standing Committee on Lawyers in the Armed Forces, then chaired by RADM John S. Jenkins, JAGC, U.S Navy (Ret.), a former Judge Advocate General of the Navy, to form the Standing Committee on Armed Forces Law, chaired by Eileen Riley of the Maryland Bar, a Naval Reserve judge advocate. The first items of business on the agenda⁷¹ at that committee's first meeting were General Nelson's letter, and a draft of a

69. (continued) Committee meeting discussion of changes to composition of JSC initiated by the author, with suggestion by Code Committee Chair that the matter be brought to the attention of DOD General Counsel Jamie S. Gorelick; Letter from Kevin J. Barry to Jamie S. Gorelick (July 14, 1993) (noting Code Committee Chair suggestion on May 14, 1993 and recommending changes to the composition of and the procedures followed by the JSC); MIL. JUST. GAZ. No. 5 (Jan. 1993) (noting proposal for *MCM* changes submitted to JSC by G. Arthur Robbins, and that the same recommended changes were on the agenda (Recommendation 107A addressing R.C.M. 1112, 1201(b) and 1203(c)) for the upcoming ABA meeting in Boston). These proposed changes were designed "to ensure that convicted service members have the right to review and comment on all stages of military administrative review of their case" and "to provide for the opportunity for convicted service members to review and submit petitions to the appropriate service Judge Advocate General for certification of a case to the [Court of Appeals for the Armed Forces]. *Id.* The ABA House of Delegates adopted the proposals in February 1993. ABA HANDBOOK, *supra* note 41, at 285. The proposals have not been implemented.

70. *See supra* note 67.

71. *See* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ARMED FORCES LAW, AGENDA III.A. (Oct. 15, 1994).

report and recommendation later proposed on the same subject.⁷² The concern of the ABA was that “a better system to obtain meaningful public input during the process of adopting . . . changes to the MCM” was needed.⁷³ The report noted the current procedures under 32 C.F.R. Part 152, but found the current practice “less than satisfactory.”⁷⁴ The report expressed concern with the inability of the Committee and others to obtain any information on the “reasons for the changes” proposed.⁷⁵ The Committee noted that because the JSC was the “primary (and virtually the sole) organization which prepares changes to the MCM, and which proposes changes to the Uniform Code of Military Justice,” its work was particularly important. It thus was essential that there be a better mechanism for obtaining information, because it was “difficult (sometimes impossible) to discern the rationale for the various changes.”⁷⁶ The Committee also noted that other aspects of the process contributed to the problem: “the meetings of the JSC are generally closed to the public [fn 3], and records of the agenda, the disposition of various proposals, or of the deliberations generally, are not open or available to the public.”⁷⁷

The Committee’s recommended solution was for the DOD to follow Federal Register-type notice and comment rule making:

RESOLVED, that the American Bar Association urges the Secretary of Defense to adopt rules requiring that all recommendations for changes to the [MCM], the Presidentially promulgated regulation prescribing rules of procedure and evidence for actions governed by the [UCMJ], be promulgated with the same formality of public notice, opportunity for comment, and analysis of comments received as are changes to other important rules and regulations published pursuant to the Administrative Proce-

72. Recommendations, accompanied by reports, are the vehicle for the ABA House of Delegates to adopt policy positions for the Association. ABA HANDBOOK, *supra* note 41, at 94.

73. American Bar Association, REPORT ACCOMPANYING RECOMMENDATION 115 (adopted Feb. 1995) at 1 [hereinafter 1995 ABA REPORT].

74. *Id.* at 3.

75. *Id.* at 2.

76. *Id.* at 2, 4.

77. *Id.* at 2-3. Footnote 3, which contrasts the procedures followed by the JSC with those used by the Committees which propose other federal rules, such as the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, read as follows:

See, for example, the “Procedures for the Conduct of Business by the Judicial Conference Committees On Rules of Practice and Procedure,”

dure Act and the Federal Register Act, and that no further changes to the MCM be implemented until such rules are adopted.⁷⁸

It was the Committee's belief that detailed analysis of the changes "must exist, and are necessary for each DOD reviewer, and ultimately the President, to determine the desirability of approving and implementing the proposed changes," and that "public availability of such analysis is equally necessary for the members of the SCAFL, and for the members of the public in general, to evaluate proposed changes."⁷⁹ The Committee expressed the view that what was needed was something equivalent to the "detailed 'preamble' which accompanies most Notices of Proposed Rulemaking in

77. (continued)

Federal Civil Judicial Procedure and Rules (West, 1994) at xv. These rules are promulgated pursuant to Federal Law (28 U.S.C. 331), under which the Judicial Conference of the United States is required to carry on a "continuous study" of the rules of practice and procedure in Federal Courts, and to recommend changes to the Supreme Court. The detailed "Procedures" established for the Conference Committees require public notice of all meetings, which are to be open to the public, extensive publication of proposed changes, public notice and hearings (with transcript and full records) regarding all proposed changes, acknowledgment of suggested changes which are submitted, and advisories to the person recommending suggested changes of the action taken thereon. Additional procedures are set forth, all designed to ensure "as wide as practicable" publication and comment on proposed changes, and maximum participation by all interested parties.

78. ABA, Recommendation 115 (adopted Feb. 1995). The "formalities" of APA/Federal Register-type rule-making that the Committee sought include (1) publication of a

78. (continued) detailed "Preamble" when proposed rules are published in the Federal Register, which explains what problem exists with the current rule, what change is proposed, and why this change was selected from among the various other potential solutions to the problem that were considered; (2) providing an opportunity for interested persons to comment on the proposed changes; and (3) when final rules are published in the Federal Register, publication of an analysis of significant comments received, why the comments were deemed worthy or were not agreed to, and the changes made to the proposed rules in view of comments received.

79. 1995 ABA REPORT, *supra* note 73, at 4. In reaching its recommendations, SCAFL specifically rejected the argument that adequate rationale was already made available in the non-binding "Analysis" portion of the MCM. "We are aware of the limited rationale of the changes which is made available to the public in the few lines intended for the 'Analysis' section of the MCM. We view this as wholly insufficient, however." *Id.*

the Federal Register, and which provides in-depth analysis of the reasons for the proposed changes.”⁸⁰

Finally, the Committee noted and rejected the argument that DOD need not follow public notice and comment rule-making procedures for *MCM* rule changes because there was no legal requirement to do so. In the Committee’s view,

it has been past practice of the Department, and of other agencies of government, to seek public comment using full APA and Federal Register publication on matters of importance even though the law did not require such treatment.[fn 6] It is our perception that changes to the *MCM* are certainly no less important (and perhaps more important) than these changes to other regulations within the military structure.⁸¹

In February 1995, the ABA House of Delegates adopted Recommendation 115.

80. *Id.* See *supra* note 78. Others have noted the great difficulty in evaluating proposed changes, even when the full text of the change is available. Because the changes do not include either a “section-by-section” analysis, or a “redlined” text showing how the current provision is being changed, it is almost impossible to determine simply by reading the (continued) proposed change what is being changed or why. Rather, it is necessary to do a comparative reading of the current provision, evaluate how the change would affect it, and then try to reason (or speculate) as to why that change was being proposed. “The whole current system is entirely unsatisfactory.” Telephone Interview with James R. Klimaski (Mar. 1, 2000). Mr. Klimaski is one of the few members of the civilian bar who have attended open meetings of the JSC and provided comments in response to proposed *MCM* amendments.

81. 1995 ABA REPORT, *supra* note 73, at 4-5. The footnote [fn 6] in the quoted text read in part as follows:

As an example, see 41 Fed. Reg. 116 at 31663 (June 17, 1981) proposing DOD Directive 1332.14, addressing “Enlisted Administrative Separations,” and noting that “[a]lthough Part 41 pertains solely to agency management and personnel, thus obviating the requirement under 32 C.F.R. 296 (1978) for notice and public comment, the proposed rule nonetheless is set forth herein to obtain the views of the public.” . . . See also the Notice of Proposed Changes to the Rules of Practice and Procedure of the United States Court of Military Appeals. (59 Fed. Reg. 94, at 25622 dated May 17, 1994). The extensive discussion of the merits of the issue by the majority and the minority members of the Court’s Rules

B. DOD Directive 5500.17—Reissued 8 May 1996

More than a year after the ABA adopted Recommendation 115, DOD reissued its directive governing the JSC.⁸² This directive was in large measure a restatement of the 1985 Directive, but did bring the regulation into line with then-current practice, including calling for full-text publication of proposed rule changes⁸³ and for a public meeting of the JSC to receive public input during the seventy-five-day comment period.⁸⁴ Under this rule, the JSC is required to “consider all views presented at the public meeting and written comments submitted during the 75-day period in determining the final form of any proposed amendments to [the *MCM*].”⁸⁵ What the directive does not do is require that there be any accounting to the public (or even any response to the commentators) regarding the results of that consideration.

What the directive also does not do is specifically address the issues raised in the 1995 ABA Report on Recommendation 115, or implement the recommendation for a rule-making process with the detailed explanation and justification common to Federal Register/APA rule-making.⁸⁶ It does, however, lean slightly in that direction, imposing a requirement that, when the JSC prepares the draft of the annual review (by May first each year), it should not only set forth “any specific recommendations for changes” to the *MCM*, but should in addition “include a concise statement of the basis and purpose of any proposed change.”⁸⁷ This was a healthy new addition to the regulation, and should have begun to serve the purpose of providing some rationale for the changes proposed. Unfortunately, a review of the

81. (continued)

Advisory Committee (pp. 25622-25) make it clear that the adoption of the proposed rule is a matter on which reasonable minds can differ, and makes it much easier for members of the public to make meaningful comments. If it is desirable for the rules of the highest military *appellate* court to have its rules adopted with public notice and comment, it would seem to be at least as desirable that the same benefits be available for the adoption of changes to the military *trial and intermediate appellate* court rules contained in the *MCM*.

82. 1996 DOD Directive, *supra* note 31. See also *supra* notes 47-52 and accompanying text for the superseded 1985 directive.

83. 1996 DOD Directive, *supra* note 31, encl. 2, at E2.4.2.

84. *Id.* encl. 2, at E2.4.6.

85. *Id.*

86. See *supra* note 78.

87. 1996 DOD Directive, *supra* note 31, encl. 2, at E2.1.4.

proposed amendments resulting from the three annual reviews conducted since this 1996 DOD Directive was issued indicates that prior practice remains unchanged. To the extent that one can find any indication at all of the “basis and purpose” of the many changes proposed in the last three years, it is the usual summary that traditionally has been prepared for inclusion in the “Analysis” section of the *MCM*. This is the identical type of statement that has been found “less than satisfactory”⁸⁸ by the ABA to allow for meaningful review and comment.⁸⁹

What is perhaps most surprising is that, although the 1996 DOD Directive “canceled” and superseded the 1985 version of the same directive, it is the former version which—four years later—remains codified at 32 C.F.R. Part 152. The failure to publish and file the directive in the Federal Register, and thus to update the Code of Federal Regulations, only results in confusion as to what the current law and practice really is. In addition to publishing the procedures for amending the *MCM* in the CFR, the DOD should consider placing them in the *MCM* itself, where they will be readily available to the users of the *Manual* (who are the ones most likely to have suggestions for change).

C. 2000—Changes to JSC Procedures Implement Most of Recommendation 115

In 1997 SCAFL proposed—and the ABA adopted—a second recommendation (100)⁹⁰ regarding *MCM* rule making, which, like the earlier 1995 Recommendation, was opposed by DOD. It has received no action. Despite the lack of implementing action in DOD, the active consideration of aspects of the military justice system by SCAFL continued, as did the active dialogue between SCAFL and DOD and the JSC.

In the spring of 1999, at its meeting in Groton, Connecticut, SCAFL considered two versions of a proposed report and recommendation calling

88. See *supra* note 74 and accompanying text, and note 79.

89. See Notice of Proposed Amendments, 62 Fed. Reg. 24,640 (May 6, 1997); Notice of Proposed Amendments, 63 Fed. Reg. 25,835 (May 11, 1998); Notice of Proposed Amendments, 64 Fed. Reg. 27,761 (May 21, 1999). In addition to these three “Annual Review” proposals, one additional proposal addressing the offense of adultery was promulgated on 14 August 1998. Notice of Proposed Amendments, 63 Fed. Reg. 43,687. This proposal, while containing a statement of the reason for the proposal in general, also lacked any statement of the “basis and purpose” for the actual changes to the *MCM*.

90. See *infra* notes 100-125 and accompanying text.

for Congress to use the occasion of the fiftieth anniversary of the enactment of the UCMJ as an appropriate occasion to require (or itself conduct) a comprehensive review of the military justice system, something not accomplished in many years. One version would have had the review accomplished by Congress, the other by a diverse and broadly constituted commission. The proposals were discussed, and the concept was preliminarily adopted, subject to a revision of the report.⁹¹ At SCAFL's next meeting in August 1999, the proposal was tabled, and a redraft of the report was ordered. In October 1999, at the SCAFL meeting in Washington, D.C.,

three of the five senior service attorneys were present at the meeting and spoke strongly against the recommendation . . . as unnecessary . . . [but] . . . the TJAGs indicated their belief that there were things that could be done to address the concerns of the ABA and legal commentators, and that they could do a better job of seeking and accounting for public comments and proposals to modify the system. Specifically addressed were providing a summary of comments received and the rationale for not adopting suggested changes.⁹²

At the next SCAFL meeting, at the ABA mid-year meeting in Dallas on 12 February 2000, during the discussion on the redrafted UCMJ review commission proposal, Major General Walter Huffman, The Judge Advocate General (TJAG) of the Army, speaking for the service branch TJAGs, announced that a new document (Internal Organization and Operating Procedures of the Joint Service Committee on Military Justice) had been adopted that substantially modified the military rule-making process.⁹³ General Huffman announced the new procedures in general terms, and distributed copies of the new regulation. The following, the most significant of the new procedures, have been keyed to the relevant paragraphs of the regulation set forth in the Appendix to this article:

91. See AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ARMED FORCES LAW, AGENDA, Tab A (Aug. 7, 1999).

92. MIL. JUST. GAZ. No. 71 (Nov. 1999).

93. The new regulation is reproduced in its entirety in the Appendix. See JSC 2000 PROCEDURES, *supra* note 39. Many of the procedures set forth in the new regulation closely follow the earlier JSC 1980 PROCEDURES and this document presumably supersedes the earlier document. See JSC 1980 PROCEDURES, *supra* note 30.

- a. An annual call for proposals would be sent to appropriate entities, including the judiciary, trial and defense organizations, judge advocate general schools, etc. [¶¶ III.B.1, III.B.2.]
- b. An invitation would be published in the *Federal Register* inviting the public to submit proposals. [¶¶ III.B.4, II.A.6]
- c. All proposals received would be acknowledged in writing. [¶ II.A.3.]
- d. All proposals received from the public would be acknowledged in writing, [¶ III.D.3.a.] and placed on the agenda for the next meeting of the JSC. [¶ III.D.3.b.] The individual or entity submitting such a proposal would be notified in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, to reject it, to table it, or to accept it. [¶ III.D.3.c.] (It does not appear, however, that any statement of the reasons for the JSC's decision is required to be given as part of the notice.)
- e. Except for those submitted by the DOD General Counsel or the Code Committee (and presumably by the public), all proposals are required to be signed by a responsible official, [¶ III.D.1.] and to contain "a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem." [¶ III.D.2.]
- f. All proposals would be published for public comment in the *Federal Register* "in accordance with DoDD 5500.17, Enclosure 2, paragraph E2.4." [¶ II.A.6.]⁹⁴
- g. Comments received would be summarized, and an explanation of JSC action to adopt or not to adopt suggested changes, and the reasons why, will be prepared. Both will be published in the *Federal Register*. [¶ II.A.7.]

94. Paragraph E2.4.2. of Enclosure 2 to DOD Directive 5500.17 requires that in most cases "[t]he full text of proposed changes, including analysis and discussion, shall be published." Presumably this "analysis and discussion" would (it certainly *should*) include the full rationale required to be submitted by ¶ III.D.2. of the new JSC procedures.

As noted in favorable comments at the SCAFL meeting,⁹⁵ the new regulations seem to substantially implement the ABA's 1995 Recommendation 115 calling for Administrative Procedure Act (APA)/Federal Register-type rule making for *MCM* changes. Once effected, there *should be* no noticeable difference in the processing of these rules and the processing of other important federal rules that are subject to the APA (and which receive full publication, with a preamble setting forth the background and rationale for proposed rule changes, and which receive an accounting of the department's views of substantial comments received when promulgating final rules).⁹⁶ After hearing these new procedures, and further discussion, SCAFL elected to cancel further consideration of the proposal for a UCMJ review commission.⁹⁷

The promulgation of this new regulation is a giant step forward in the process of *MCM* rule making. The DOD had maintained for years that such publication and accounting for action on proposals is not required by law.⁹⁸ However, there is no prohibition to following procedures equivalent to the APA rule-making procedures when appropriate,

95. See MIL. JUST. GAZ. No. 75 (Feb. 2000).

96. Whether in fact the new JSC procedures will bring this rule-making process into harmony with other APA rule making has yet to be shown. An apparent divergence in the JSC 2000 Procedures is that there is no obligation to set forth reasons for the initial JSC action on a proposal submitted in response to a Federal Register invitation. Paragraph III.D.3. addresses processing of proposals from *other than* DOD agencies and the Code Committee. This paragraph states that the "Chairman will acknowledge receipt of the proposal in writing." Paragraph III.D.3.b. requires the proposal to be "placed on the agenda of the next JSC meeting and discussed according to procedures for new business [which provide four options: to decline the proposal as not within the JSC's cognizance, reject it, table it, or accept it]." Paragraph III.D.3.c. states: "The individual or agency submitting the proposal shall be notified in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, reject it, table it or accept it." There is no requirement that there be any reasons stated for the action taken. This seems, in light of the discussions at the SCAFL meeting, and the intent in adopting the new procedures, to be an oversight in the new regulation—one which should be corrected.

97. MIL. JUST. GAZ. No. 75 (Feb. 1999).

98. 5 U.S.C. § 553(a)(1) exempts "a military or foreign affairs function" from the rule-making provisions of the Administrative Procedure Act. See generally Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135 (1985). Whether military court rule making, in the normal course of events, in peacetime, properly fits within this exemption, has never been adjudicated. Whether court rules for a system of justice such as this (which tries every manner of crime during both peace and war, and has power to sentence offenders to death) *ought* to fit into this exemption is a question which can be addressed as a matter of public policy. It appears that that policy call has now been made, and at least starting in 2000, the determination is that changes to the

even if not strictly required, and to do so is not novel.⁹⁹ For DOD to do so in this instance is the right thing to do, and the department and the military services should be recognized and credited for taking this step.

In view of the importance and public nature of the activity now set forth in these operating procedures, however, some more formal mechanism for promulgation should be chosen than the JSC's internal operating procedures document, which is signed only by the members of the JSC. These regulations ought to be more officially promulgated, such as by an amendment to DOD Directive 5500.17. Thereafter, as noted in the prior section, the DOD directive should be published in the CFR, and the procedures should be placed in the *MCM* as well.

IV. Recommendations for the Future

Despite the recent changes and advances, the DOD and the JSC still have before them at least two major recommendations for change to this rule-making process that are designed to address deficiencies in the process that were not addressed either by ABA Recommendation 115 or by the recent February 2000 changes to the operating procedures. Until these are seriously studied, and until they are implemented in some substantial form, this system will still not be adequate either to instill public confidence or to ensure that the best rules are adopted.

A. 1997—ABA Recommendation 100

In February 1997, the ABA House of Delegates adopted Recommendation 100, sponsored by SCAFL (along with a number of other entities). The recommendation called for a major revision in the way the *MCM* rule-making process was carried out and for changes to the entities responsible for proposing changes to the *MCM*. The recommendation read as follows:

RESOLVED, That the American Bar Association recommends that federal law be amended to model court-martial rule-making procedures on those procedures used in proposing and

98. (continued) rules for this system of justice ought to—and henceforth will—follow rule-making procedures essentially equivalent to those set forth in the APA. It is clearly a policy call that the ABA and other commentators should—as this one does—heartily applaud.

99. *See, e.g., supra* note 81.

amending other Federal court rules of practice, procedure, and evidence by establishing:

(1) a broadly constituted advisory committee, including public membership and including representatives of the bar, the judiciary, and legal scholars, to consider and recommend rules of procedure and evidence at courts-martial;

(2) a method of adopting rules of procedure and evidence at courts-martial which is generally consistent with court rule-making procedures in Federal civilian courts;

(3) requirements for reporting to Congress [and] a waiting period for rules of procedure and evidence at courts-martial.¹⁰⁰

Clearly this recommendation represents a significant step past the APA/Federal Register-type notice and comment rule making that had been the thrust of SCAFL's recommendation two years earlier. It is important to review how and why the issue had moved forward to a call for a new rule-making process paralleling that in other federal courts, and the substantial development that had occurred in the analysis by SCAFL members of what was at the heart of the problem in *MCM* rule making.

Throughout 1995 and 1996, SCAFL had maintained an ongoing dialog with representatives of the JSC and the DOD general counsel's office regarding the *MCM* rule-making process and the issues raised by Recommendation 115.¹⁰¹ As the discussions continued, it became clear that the DOD was not disposed to implement Recommendation 115. The reissuance of DOD Directive 5500.17 on 8 May 1996,¹⁰² with no mention of Recommendation 115 more than a year after its adoption, made it apparent that the DOD was unwilling to require the kind of explanations and rationale for *MCM* changes that the bar was seeking.

A variety of suggestions for improving the rule-making process continued to be discussed within SCAFL and with the representatives of the DOD and the JSC. As these discussions progressed, an awareness developed within SCAFL that, even if Recommendation 115 were adopted, it would not be able to solve the more fundamental problems inherent in the

100. ABA RECOMMENDATION 100 (adopted Feb. 1997).

101. REPORT TO ACCOMPANY RECOMMENDATION 100, at 4 (Feb. 1997) [hereinafter 1997 ABA REPORT].

102. See *supra* notes 82-89 and accompanying text.

JSC rule-making apparatus. Much earlier, SCAFL had been aware of (and cited) the broad public notice and “on the record” comment process followed by the advisory committees charged with recommending changes to other federal court rules (such as the Federal Rules of Evidence, and the Federal Rules of Criminal Procedure).¹⁰³ It was a short step beyond that to look also at the *composition* of those advisory committees, which under federal law were required to be composed of “members of the bench and the professional bar and trial and appellate judges,”¹⁰⁴ and to realize that the JSC did not fare well by comparison. SCAFL noted that the voting membership of the JSC consists of only five members, one senior uniformed attorney for each service, and quoted from an “authoritative source” that identified the JSC members as “the officers responsible for criminal law in the armed forces.”¹⁰⁵ SCAFL noted also that “there is no representation on the JSC from the bench or bar, including the defense bar, from academia, or from the public generally.”¹⁰⁶ The broader advisory committees employed in other federal rules “are designed to secure ‘as broad an outlook and base as possible’ in studying and recommending court rules and rules changes” to the Supreme Court, the congressionally authorized rule maker for such federal rules.¹⁰⁷ Moreover, SCAFL observed that the procedures followed by the JSC were not the “type of open and public rule-making procedures established for the Federal court rule-making process, which are designed to instill public confidence in the courts, as well as to insure that the best possible rules are adopted.”¹⁰⁸ Finally, the Committee observed that the other federal rules were required to be reported to Congress, with “an appropriate waiting period required to ensure effective congressional oversight.”¹⁰⁹ Because of these factors, the Committee reached the conclusion that “the DOD process, even if modi-

103. See *supra* note 77.

104. 28 U.S.C. § 2073(a)(2) (2000). “The Advisory Committee on Criminal Rules has 12 members from the bench, bar and academia, in addition to the chair, and is assisted by a reporter, a secretary and a liaison member.” 1997 ABA REPORT, *supra* note 101, n.9 (quoting West, *Federal Civil Judicial Procedure and Rules*, xxvii (1996 ed.)).

105. 1997 ABA REPORT, *supra* note 101, at 8 (setting forth verbatim the same quotation from GILLIGAN & LEDERER previously addressed). See *supra* note 35 and accompanying text.

106. 1997 ABA REPORT, *supra* note 101, at n.3.

107. *Id.* at 2.

108. *Id.* at 2, 3.

109. *Id.* at 3. The MCM rules were, from 1950 until 1990, required to be reported to Congress. However, “in 1990, as part of the Defense Authorization Act Pub. L. 101-510 and Title XIII Reduction in Reporting Requirements, Congress inexplicably repealed the reporting requirement of Article 36, UCMJ.” *Id.* at 8.

fied, would remain unable to provide the President with the benefits now enjoyed in every other Federal court rule-making process.”¹¹⁰

The 1997 ABA Report includes an extensive review of the background and policy considerations underlying the Rules Enabling Act and related statutes¹¹¹ under which the judicial conference of the United States and the federal rules advisory committees operate, and in which rules are proposed in a process that is entirely “on the record,” with meetings noticed in the Federal Register and open to the public, and with all papers, proposals, minutes, and the like, available to the public.¹¹² The report noted also that the federal rule-making process satisfies long published ABA policy on the subject, but that the military process falls short. SCAFL could find no military necessity justifying the current procedures, and concluded that a similar process to that followed by the Federal Judicial Conference and the federal court rules advisory committees would substantially benefit the military rule-making process, result in better rules, and enhance public confidence in the resulting rules, as well as in the military justice system as a whole.¹¹³

In reaching its recommendations, SCAFL did specifically consider actions that could be taken by the DOD both to implement Recommendation 115 or to modify or expand the operation of the JSC. One option had repeatedly surfaced and been given serious consideration by SCAFL: the expansion of the JSC to include public members (as had been done in 1983 with the Code Committee).¹¹⁴ The Department of Defense and JSC representatives vigorously opposed this option, arguing that the JSC was an “internal” DOD committee, and that it would be inappropriate to add public members, or to deprive DOD of this internal committee, which also was tasked with proposing legislative proposals to amend the UCMJ. The DOD and JSC also argued that there were Federal Advisory Committee Act considerations,¹¹⁵ and that an advisory committee with outside mem-

110. *Id.* at 4.

111. *See, e.g., id.* at 4; 28 U.S.C. §§ 2071-2077, §§ 331-335.

112. 1997 ABA REPORT, *supra* note 101, at 5-7, 9-10.

113. *Id.* at 11, 12.

114. *See* Pub. L. No. 98-209, § 12(a)(1) (1983) (amending 10 U.S.C. § 867(g)). This 1983 amendment, in addition to adding two public members to be appointed by the Secretary of Defense, added the senior lawyer from both the Marine Corps and the Coast Guard to the Code Committee, previously comprised only of the judges of the Court of Military Appeals and The Judge Advocates General.

115. Some of the considerations advanced were the policy against the proliferation of advisory committees, the cost, and the fact that such a committee would introduce additional delay into the process of adopting rule changes.

bers was inappropriate for legislative or other internal DOD review functions. SCAFL accepted the logic of this argument, and concluded that what was needed was not an expanded internal committee, but rather a separate advisory committee, similar to the other federal advisory committees, which could draw from all sources in making proposals.¹¹⁶

SCAFL concluded that even full implementation of Recommendation 115 would be insufficient to address the concerns that now were evident.

The Standing Committee is now persuaded that a more fundamental change is necessary, consistent with the practice in Federal civilian courts. The present Recommendation does not address in any way the process employed within the Department of Defense (DOD). Rather, it reflects the Standing Committee's view that that DOD process, even if modified, would remain unable to provide the President with the benefits now enjoyed [by the Supreme Court as rulemaker] in every other Federal court rule-making process.¹¹⁷

The DOD opposed the adoption of Recommendation 100 in the strongest terms.¹¹⁸ The DOD argued, *inter alia*, that the proposal would substantially lengthen the process with negligible value added, would "burden, and hence diminish, the authority of the President, the DOD, and the military departments," ignored the unique expertise in the military departments, and was unnecessary since the process "is not broken and does not need mending."¹¹⁹ In response to this letter, Colonel Frank Moran, a retired Air Force judge advocate and the then-Chair of SCAFL,¹²⁰ specifically challenged the underlying premise that "the Presi-

116. The option of expanding the JSC to include other "internal" members, from the military trial and/or appellate judiciary, or the military defense, was surfaced at the SCAFL meeting in October 1999. "One TJAG raised the possibility of expanding the Joint Services Committee widely considered to be currently understaffed, to include voting representatives from the military judiciary and military defense bar." MIL. JUST. GAZ. No. 71 (Nov. 1999). Such an expansion, if implemented, would help to meet some of the concerns regarding the limited and homogeneous membership of the JSC. Both this option, and the possibility of putting public members on the JSC, were again raised at the February 2000 SCAFL meeting, but once again drew essentially negative responses from DOD and JSC representatives.

117. 1997 ABA REPORT, *supra* note 101, at 4.

118. Letter from Judith A. Miller to N. Lee Cooper (President, ABA) (Jan. 21, 1997). This letter was co-signed by the general counsels of each of the military departments, each of the Judge Advocates General, and the Staff Judge Advocate to the Commandant, USMC.

119. *Id.* at 2.

dent could not substantially benefit from additional expertise, including that of this Association, in the process of military court rule making.”¹²¹ He quoted at length from General Nelson’s 1994 letter¹²² in response to the contention that the system was “not broken.” He confirmed that rather than ignoring the expertise within the DOD, the committee had acknowledged it, but questioned “the lack of breadth of the [JSC’s] expertise,” and reached the conclusion that the “breadth of expertise which will be available in an advisory committee will add substantial value to the considerable (but limited) perspectives of the military members of the JSC.”¹²³ Rather than diminishing the President’s power, that power would be effectively enhanced, since “the resultant rules forwarded for consideration . . . would be of higher quality, and would come with full and public consideration and justification.”¹²⁴ In summary, and against the remaining arguments, Colonel Moran concluded definitively:

I feel strongly that the military rule-making process desperately needs expanded perspectives and experience by the addition of military and civilian counsel and judges, and academicians, all who may have substantial experience in military law. The adoption of a more open process modeled on one that has worked so successfully in other federal courts is bound to improve the final product and enhance the President’s court-martial rule-making function.¹²⁵

When the debating was concluded, the House of Delegates adopted the proposal. To date, there has been no apparent change to the position of the DOD on the recommendation.

B. General Hodson’s 1973 Call for a Military Judicial Conference

What the SCAFL proposal did not do is precisely define how its military rules advisory committee would interact with the JSC, and how it would fit into the structure of presidential rule making. What is clear is

120. Letter from Francis S. Moran, Jr. to N. Lee Cooper (Jan. 27, 1997) [hereinafter Moran Letter].

121. *Id.* at 1.

122. *See supra* note 67 and accompanying text.

123. Moran Letter, *supra* note 120, at 2.

124. *Id.* at 3.

125. *Id.*

that under this proposal, the President's authority to act as rule maker, both under statute and under broader constitutional authority, would be unchanged.¹²⁶ SCAFL believed its proposal "would complement the expertise of the Joint Service Committee,"¹²⁷ and that the "President in exercising his congressionally authorized rule-making for courts-martial should be afforded the benefits of participation and assistance of the civilian professional bar as well as the military professional bar, in a public rule-making process."¹²⁸ The clearest statement of the interrelationships comes from Colonel Moran's response to the DOD General Counsel:

The only thing that will change is that all proposed rules, whether proposed within DOD or from without, would be considered by a broadly constituted committee which would bring to the table considerably more breadth and expertise than is now the case, and that the resultant rules forwarded for consideration within the administration for implementation by the President would be of higher quality, and would come with full and public consideration and justification. The President's authority would be no less than were he to create an advisory committee under current authority for that purpose.¹²⁹

Nowhere in the reports or discussions of SCAFL, over the two-year period that the 1997 ABA Report was developed, is there any mention of General Hodson's earlier recommendation that "a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence,"¹³⁰ and it is clear that the committee was unaware of it. Had the members known of this proposal, there is no doubt that it would have been given consideration, and would have been cited as persuasive authority in

126. "The President's authority is unchanged." *Id.* SCAFL made no specific recommendation to change Article 36, UCMJ, but Colonel Moran noted that "[t]he President's authority would be no less than were he to create an advisory committee under current authority for that purpose. In fact, the Recommendation contemplates a statutory committee in part due to refusal of DOD in the past to consider and recommend that such a committee be established." *Id.*

127. 1997 ABA REPORT, *supra* note 101, at 11.

128. *Id.* at 11-12. The Report immediately thereafter lists the benefits of this proposal: "Both the quality of the resulting military court rules, and the public's confidence in military justice will be enhanced. The military court rule-making process will then be deserving of the same respect and public confidence presently accorded rules for civilian Federal courts." *Id.* at 12.

129. Moran Letter, *supra* note 120, at 3.

130. Hodson, *supra* note 8, at 605.

support of the principles underlying their proposal. Perhaps more, SCAFL may well have modified its proposal to use the same “military judicial conference” language used by General Hodson. The two proposals seem to be identical in their intended effect, as well as in virtually all of their particulars. Indeed, while SCAFL in calling for a rules advisory committee never took the next step to call for a “military judicial conference,” its report spends several pages setting forth the statutes and policy underlying the Rules Enabling Act and the related statutes which authorized the advisory committees formed within the structure of the Federal Judicial Conference. SCAFL identified this federal structure as the model for its proposed changes to military court rule making. SCAFL called for the establishment of an advisory committee with precisely the same broad composition and open and public rule-making procedures as are followed by the federal rules advisory committees.

Regrettably, General Hodson did not develop his recommendation for a military judicial conference in any detail. One can surmise, however, from his use of the term “judicial conference” that what he envisioned is exactly that same sort of structure that has been in place at least since 1958 in the civilian court rule-making process.¹³¹ A review of that process, both as set forth in the 1997 ABA report and in other sources, indicates that General Hodson’s proposal is entirely consistent with that of SCAFL, but adds the judicial conference element, allowing for a more clear understanding of how the SCAFL recommendation could be implemented. Application to the military of a similar judicial conference structure to that employed in the federal court arena would clearly define the place of the military court rules advisory committee in the overall structure.

Under the civilian model, the Supreme Court is the rule maker, and acts on recommended changes which are initially developed by one of five advisory committees, are then reviewed by the “standing committee” (Committee on Rules of Practice and Procedure), and thereafter reviewed and approved by the judicial conference.¹³² “The Standing Committee and the various advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the

131. See WEST, *FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES* ix (1999).

132. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *THE FEDERAL RULES OF PRACTICE AND PROCEDURE* (1993) [hereinafter *FEDERAL RULES PAMPHLET*]. This pamphlet, produced by the Administrative Office, sets forth a concise summary of the rule-making structure and process. With only one advisory committee in the military structure, the need for the level of review provided by the “Standing Committee” would disappear, as would the need for the Standing Committee itself.

Department of Justice.”¹³³ The committees have the assistance of the Support Office of the Administrative Office of the U.S. Courts.¹³⁴ The process followed by the advisory committees is totally open and “on the record.”¹³⁵ The entire process “demands exacting and meticulous care,” is “time-consuming,”¹³⁶ and involves a “minimum of seven stages of formal comment

133. *Id.* “Each Committee has a reporter, a prominent law professor, who is responsible for coordinating the committee’s agenda and drafting appropriate amendments to the rules and explanatory committee notes.” *Id.* A military rules advisory committee would presumably have a similarly qualified reporter. It is also assumed that the DOD would be prominently represented, along with the DOJ.

134. A military rules advisory committee would need to have adequate administrative support. Such support could be provided by the military judicial conference, either independently or perhaps through arrangement with the Support Office of the Administrative Office of the U.S. Courts. Indeed, it would appear that some savings of resources and some gleaning of expertise could be had by the latter arrangement. In previous studies regarding the military justice system, it has normally been DOD that has supplied administrative support. As the entity which represents a party in all litigation in this system, and that administers the system within the services, it would seem appropriate that DOD not be the entity tasked to provide administrative support. (It is noted that DOJ does not serve the role of support agency to the Federal Judicial Conference.) On the other hand, DOD provides administrative support to the Court of Appeals for the Armed Forces, apparently with no suggestion that this would be a function better served by the Administrative Office of the U.S. Courts or an equivalent body.

135.

Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office.

FEDERAL RULES PAMPHLET, *supra* note 132. Contrast the closed nature of the process by the current military court rules committee, the JSC.

136. As a result of this careful process, it “usually takes two to three years for a suggestion to be enacted as a rule.” *Id.* This period might on first glance seem too long for military rules that may have to be amended quickly to adapt to changing (for example, war-time) circumstances. However, it took two years to prepare the changes that resulted in the Military Rules of Evidence, and four years to prepare the changes that substituted the Rules for Courts-Martial and the rest of the new *MCM* in 1984 for the prior narrative version. In addition, it typically now takes two years (or often much more) to enact changes under the current process. For example, rules implemented in Executive Order (E.O.) 12,888 signed by President Clinton on 23 December 1993, were originally noticed to the public on 29 June 1990. 55 Fed. Reg. 26,740. This amounts to a three-and-one-half year delay from initial notice of proposed rules to enactment. *The delay is actually considerably longer.* The initial notice to the public does not constitute the beginning of the process, but is actually the *end* of the JSC process, and reflects the judgment of the JSC that the rules, initially pro-

and review.”¹³⁷ However, because there would be but one rules advisory committee in a military judicial conference model, there would be no need for the coordinating functions of a “standing committee,” and this step would be unnecessary. Accordingly, what looks like a lengthy process should actually be somewhat shorter in the military judicial conference structure.

The SCAFL proposal to add “three critical features” to the current practice (“an advisory group with broad representation, . . . a broad, public rule-making method, . . . [and] meaningful congressional oversight”¹³⁸) melds seamlessly into Hodson’s proposal for a military judicial conference patterned after the civilian judicial conference model.¹³⁹ It would, however, necessitate certain changes to current practice.

Under the current scheme, the only statutory requirement to review the military justice system is placed on the Code Committee.¹⁴⁰ The JSC has no statutory mandate to conduct an annual review.¹⁴¹ It is envisioned that the military judicial conference, once created, would be given the stat-

136. (continued) posed on earlier dates (which are not made available to the public) ought to be adopted. Other recent rules have experienced lengthy delays as well. For example, rules implemented by E.O. 12960 on 12 May 1995, were originally noticed to the public on 14 April 1993 (58 Fed. Reg. 19,409) or on 14 April 1994 (59 Fed. Reg. 17,771). The conclusion to be drawn is that the civilian process, a well-ordered one, actually might result in rules being enacted more swiftly than has been the common experience under the current practice. The President’s authority to bypass the usual process, and to implement rules on an emergency basis, would remain intact.

137. 1- Initial consideration, 2- Publication and public comment, 3- Consideration of public comment and final approval by the Advisory Committee, 4- Approval by the Standing Committee, 5- Judicial Conference approval, 6- Supreme Court approval, and 7- Congressional review. FEDERAL RULES PAMPHLET, *supra* note 132.

138. 1997 ABA REPORT, *supra* note 101, at 11.

139. SCAFL concluded that a military rule-making process modeled on the civilian model “which has worked so successfully . . . is bound to improve the final product and enhance the President’s court-martial rule-making function.” Moran Letter, *supra* note 120, at 3.

140. 10 U.S.C. § 946(a) requires the Code Committee to conduct “an annual comprehensive survey of the operation of this chapter.” The Code Committee is comprised of the judges of the Court of Appeals for the Armed Forces, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and two members of the public appointed for three-year terms by the Secretary of Defense. 10 U.S.C. § 946(b), (d).

141. The JSC’s authority and mandate derive from DOD Directive 5500.17, which implements the provision in E.O. 12473 that requires that the Secretary of Defense conduct an Annual Review and recommend appropriate amendments. *See supra* note 46 and accompanying text.

utory task of conducting an annual review/comprehensive survey of the operation of the military justice system, and that the mechanism to accomplish that would be patterned after 28 U.S.C. 331, the statute that sets forth the Federal Judicial Conference functions, including that of carrying on a “continuous study of the operation and effect of the . . . rules of practice and procedure.” The DOD and the JSC would be represented on the advisory committee, just as the Department of Justice (DOJ) is currently represented on the various federal rules advisory committees and the standing committee.¹⁴² Concerning the membership of the military judicial conference, consideration should be given to including, in addition to judges from Court of Appeals for the Armed Forces, other military trial and appellate judges, and trial and appellate judges from the federal system.

With such a military judicial conference model, the JSC would presumably continue its present functions, operating as an internal DOD committee, and its proposals for changes to the *MCM* would be forwarded, along with those of other proposers, to the advisory committee, similar to the way the DOJ now makes proposals to the federal rules advisory committees. The advisory committee would in due course make recommendations directly to the military judicial conference. Once the military judicial conference completed its review, it would make its recommendations to the President as rule maker. Once approved by the President, the rules would be reported to Congress¹⁴³ prior to implementation. The precise mechanism for issuing the final rule could be through promulgation of an executive order, or by other mechanism set forth by statute. As noted above, though this process sounds lengthy, it should be less so than the federal rules process, which is accomplished in a two-to-three-year time frame from initial proposal to rule implementation.¹⁴⁴

The SCAFL proposal, merged with the almost identical but more complete Hodson proposal, presents an appropriate and needed improvement that will provide significant benefits to the President as military court rule maker, will result in better rules, and will enhance the stature of the military justice system and the credibility of its rule-making process. No good reason exists not to implement this proposal.¹⁴⁵

142. See WEST, *supra* note 131, at xvii-xix.

143. In 1990, the requirement that amendments to the *MCM* be reported to Congress was removed. See *supra* note 109. Surely, reporting rules for court-martial to the Congress should rise to a level of importance that would exclude their elimination as a mere “paperwork reduction” measure, as occurred here.

144. See *supra* notes 136-137 and accompanying and following text.

145. Such a mechanism as outlined would not likely relieve DOD of responsibility

V. Conclusion

There can be no doubt that the military rule-making process has been in a state of evolution in the fifty years since enactment of Article 36 as part of the original UCMJ. That process has accelerated since 1978, and particularly since 1993. It took a quantum leap forward in February 2000 with the announcement of the new procedures for involving the public in a much more meaningful and accountable way. The process of change in the military court rule-making process is a dynamic one indeed.

Just as clearly, there can be no doubt that the process of change can, ought to, and will continue. The move to full-text publication of proposed changes, to public hearings, and now to accounting for public proposals has been dynamic and helpful. However, there is still no clear or enforceable mechanism to make available to the public the contents and justifications for the majority of proposals that are initiated: those generated within the DOD. This is a serious flaw in the current regulations. An open process that would allow for access not only to *all* proposals—but to *their justifications and explanations as well*—would clearly be a huge improvement.¹⁴⁶

Similarly, the minutes of the meetings of the JSC (and of its working group) and the decisions on proposals generated within the JSC and the DOD remain unavailable to the public. The process, though vastly improved, still remains largely a secret one. In addition, the membership of the JSC continues to be the five officers chiefly responsible for the administration of military justice in the five services. The breadth of perspective available from judges and counsel, and from academia and the public, is not available during the decision-making process. As noted by SCAFL, even full compliance with the 1995 ABA recommendation calling

145. for being the prime proposer of amendments to the *MCM*, but would limit the amount of direct control that the Department could exercise over the process and over the ultimate rules adopted. The influence of DOD, however, would likely be only marginally reduced. As reported by Professor David Schlueter at the November 1999 meeting of SCAFL in Washington, D.C., the DOJ is the “800 pound gorilla” in the Federal Criminal Procedure Rules Advisory Committee rule-making process, and it is rare and difficult for any amendments to be adopted without DOJ support. It is expected that DOD would be well represented on the advisory committee (as would DOJ) and would exercise similar influence. (Professor Schlueter serves not only as a member of SCAFL, but serves as the reporter for the Federal Criminal Procedure Rules Advisory Committee. WEST, *supra* note 131, at xix.)

146. Such a change would provide full implementation of ABA Recommendation 115.

for rule-making along APA/Federal Register lines would still leave the system unable to meet the goals set forth in virtually every policy statement from Congress or the ABA regarding court rule-making.

The process of change must continue to go forward. Twenty-seven years ago, one of the most renowned and respected students of this system recommended an extraordinary series of changes, including one to address the rule-making problem through the adoption of a military judicial conference. Twenty-four years later, unaware of his recommendation, the primary bar committee reviewing this system, comprised of very experienced present and former (mostly retired) military judge advocates, recommended changes along almost identical lines. General Hodson was no doubt a true visionary, and a thinker ahead of his time. Perhaps these proposals were far “out in front” a quarter-century ago; that can no longer be said. These are changes that need now to be given serious consideration—and to be implemented—by the policy makers and lawmakers who govern and operate this system.

Just as change is inevitable in the UCMJ and in the various rules contained in the *MCM*, so also is change inevitable in the process by which the UCMJ and the *MCM* are modified. The process, like the rubrics it produces, is a “work in progress.” As review and consideration of the *process* of military court rule-making goes forward, one can only hope that it will not be very long before these reforms are adopted, thereby allowing the system to evolve into one which will provide greatly enhanced integrity for the system, along with vastly increased public confidence. The final words of SCAFL in its 1997 ABA report¹⁴⁷

147. 1997 ABA REPORT, *supra* note 101, at 12.

APPENDIX

Internal Organization and Operating Procedures of the Joint Service Committee on Military Justice

I. Purpose. These operating procedures govern the operation of the Department of Defense (DoD) Joint Service Committee (JSC) on Military Justice. They are permitted by DoD Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (May 8, 1996), Enclosure 2, paragraph E2.5.1.

II. Organization. The JSC Voting Group is headed by the Chairman. The chairmanship rotates biennially among the Services in the order Army, Air Force, Marine Corps, Navy and Coast Guard. An Executive Secretary is provided by the Chairman's Service. The Executive Secretary normally chairs the Working Group.

A. Duties of the Executive Secretary. The Executive Secretary is responsible for the general administration of the JSC including, but not limited to, the following:

1. Preparation of the agenda for each meeting;
2. Notification of the representatives of the JSC of each meeting, including forwarding agenda and copies of proposals, at least one week prior to the meeting;
3. Receipt and acknowledgement of and accounting for all proposals for consideration by the JSC. A log of the proposals on hand, with appropriate columns indicating date received, date acknowledged and current status, shall be maintained. Copies of the log shall be distributed and representatives briefed, as necessary, to keep them current on proposals before the Committee;
4. Preparation of the minutes of each meeting's proposals;
5. Maintenance of files on all proposals received and all minutes of the Committee;
6. Arranging for publication in the Federal Register of proposals in accordance with DODD 5500.17, Enclosure 2, paragraph E2.4; the same notice shall include an invitation for members of the public to submit proposals for consideration in the next annual review cycle;
7. Summarizing comments received during the public comment period, providing an explanation of action taken, and arranging for publication of both in the Federal Register after coordination with the Office of the General Counsel, DOD; and
8. Such other actions as may be directed by the Chairman.

B. Duties of the Working Group. The Working Group consists of representatives of the Army, Navy, Air Force, Marine Corps, Coast Guard and the non-voting member of the Court of Appeals of the Armed Forces. It assists the Voting Group in staffing various proposals. It conducts studies of proposals and other military justice related topics at the direction of the Voting Group, and makes reports to the Voting Group, as directed.

III. Operating Procedures. The following operating procedures are hereby established:

A. Annual Review Cycle: Each annual review cycle begins on 1 May. Changes proposed by the JSC shall be forwarded to the General Counsel, DoD, for action in accordance with the provisions of DoDD 5500.17 not later than the following 1 May.

B. Call for Proposals:

1. By not later than 31 January each year, JSC Service representatives shall ensure that a solicitation for proposals is sent to appropriate agencies within their respective services.
2. Such agencies shall include, but are not limited to, the judiciary, trial and defense organizations, and judge advocate general schools.
3. Upon receipt of proposals from service agencies, each JSC representative shall review all proposals received and sponsor proposals, as appropriate, to the JSC for consideration in the next annual review cycle beginning on 1 May.
4. Members of the public will be invited to submit proposals via notice in the Federal Register, in accordance with the procedures set forth in Sections II A(6) and III D(3).

C. Meetings:

1. The JSC shall meet at the call of the Chairman, or on the request of two members of the JSC.
2. Unless good reason exists to the contrary, each member shall be notified in writing of a meeting. Each notification shall include an agenda of the meeting and copies of proposals on which a vote will be taken.
3. The Chairman shall preside and conduct the meeting normally in the following sequence:
 - a. The minutes of the last meeting shall be approved by a majority vote.
 - b. Old business shall be discussed and disposed of in the same manner as new business.
 - c. New business shall be discussed and appropriate action taken. Except

where a member has not received a copy of a proposal at least one week in advance of the meeting and declines to waive that right, the JSC shall, by a majority vote, take one of the following actions on all proposals:

- (1) decline to consider as not within the JSC's cognizance;
 - (2) reject the proposal;
 - (3) table the proposal (a tabled proposal shall be accepted or rejected within 6 months after it is tabled); or
 - (4) accept the proposal assigning it one of the following priorities:
 - (a) I (action shall be completed within three months);
 - (b) II (action shall be completed within six months);
 - (c) III (action shall be completed within one year).
4. A proposal deferred by a member due to insufficient notification shall normally be considered at the next Voting Group meeting.
5. The Working Group report on the status of each proposal referred to it shall be considered. The Chairman of the JSC may, at his or her discretion, grant an extension of up to 30 days from any priority deadline. Longer extensions shall be approved by a majority of the JSC.
6. Minutes for each Voting Group and Working Group meeting shall be prepared by the Executive Secretary and forwarded to each representative within seven working days. The minutes shall contain, at a minimum, persons attending the meeting, a summary of the matters considered and every action taken on a proposal.

D. Proposals:

1. Except for matters referred by the Code Committee or the DoD General Counsel, each proposal forwarded for consideration by the JSC shall be in writing signed by a (voting/non-voting) member of the JSC, the Judge Advocate General of a service of the armed forces, the General Counsel of the Department of Transportation, the Chief Counsel of the Coast Guard, or Staff Judge Advocate to the Commandant of the Marine Corps.
2. The proposal shall contain a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem. The proposal shall be sent to the Executive Secretary for inclusion in the agenda for the next meeting of the JSC.

3. Proposals received from individuals or organizations other than DOD agencies and the Code Committee shall be dealt with in the following manner:

- a. The Chairman will acknowledge receipt of the proposal in writing.
- b. The proposal shall be placed on the agenda of the next JSC meeting and discussed according to the procedures outlined for new business in Section III C(3)(c) above.
- c. The individual or agency submitting the proposal shall be notified in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, reject it, table it or accept it.

E. Public Comment: Each service representative shall ensure that appropriate agencies within their respective services are notified when proposals are placed in the Federal Register for public comment.

F. Record Keeping. The Army, as Executive Agent for the JSC, shall establish and maintain a system of records for the JSC. As internal working documents, these records are exempt from disclosure under the Freedom of Information Act.

At minimum, records shall be identified by calendar year, whether Voting or Working Group, and subject. The Executive Secretary shall coordinate with the Executive Agent to insure that files and documents maintained by the him or her are delivered to the Executive Agent for inclusion in the system of records.

Signed this 2nd day of March, 2000.

JOHN C. GREENHAUGH,
COL, JA, USA
Army Representative

KENNETH R. BRYANT
CAPT, JAGC, USN
Navy Representative

JAMES W. RUSSELL, III
COL, USAF
Air Force Representative

MARC W. FISHER, JR.
LtCol, USMC
Marine Corps Representative

JAMES R. MONGOLD
CAPT, USCG

Coast Guard Representative

PURSUING MILITARY JUSTICE¹

REVIEWED BY MAJOR WALTER M. HUDSON²

I. Introduction

As we celebrate the Fiftieth Anniversary of the Uniform Code of Military Justice (UCMJ), it makes sense to look at the court most responsible for its interpretation, the United States Court of Appeals for the Armed Forces (USCAAF or simply CAAF). Fortunately, the court now has the services of its own historian, Dr. Jonathan Lurie, who has provided a second volume of his history of the CAAF, *Pursuing Military Justice*. This second volume deals with the important and turbulent years, from 1951 to 1980, following the creation of the Uniform Code of Military Justice (UCMJ), and the formation of the court, originally known as the United States Court of Military Appeals (USCMA). Using Lurie's book to look back at this nearly thirty-year period may help all those involved with military justice better chart a course for the future of military justice.

Moving into a new century of military justice, important questions and concerns exist before us. Is military justice still overly "military"? Should we not continue the steady civilianization of military justice that really began with the passage of the UCMJ and the creation of the USCMA in 1951? On the other hand, is the UCMJ and its interpretations by the court symptomatic of an already over-civilianized system? Is it just another example of the kind of the "corporatizing" of the military that occurred throughout the 1950s and early 1960s (epitomized by men such as Robert MacNamara), and that had such disastrous consequences in Southeast Asia? Is it a kind of elaborate bureaucracy, an ever-widening labyrinth of rules and procedures created by and only understood by lawyers, that further and further removes the commander from the soldier? Furthermore, what about the military courts, and especially the CAAF, the entity that interprets, and to a large extent, decides what military justice is? What is its function and its place in the military, federal, and judicial com-

1. JONATHAN LURIE, *PURSUING MILITARY JUSTICE: VOLUME 2, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980* (1998).

2. Instructor, Criminal Law Department, The Judge Advocate General's School.

munities? Since its status will to a large degree decide its influence over military justice, what should its status be?

These are important questions that neither huge sums of money nor the most sophisticated technology can sufficiently answer. But after readers have finished *Pursuing Military Justice*, they will understand that these vexing questions have been raised and debated several times among various important figures and agencies in the UCMJ's and USCMA/CAAF's history. Professor Lurie, a scholar trained at Harvard and Wisconsin, guides us with the hand of an expert historian through the years 1951-1980, and lets us see some of these disputes as well as their causes.

Lurie is a history professor, not a lawyer, much less one with military experience. This is not necessarily a disadvantage. Unlike many lawyers, whose writing tend to be polemical and judgmental (perhaps a pernicious influence of brief writing), Lurie stands back and, for the most part, lets the details of history do the talking. For Lurie, the history of the court consists not so much in pivotal public events, much less watershed cases, but more in telephone conversations, interoffice memoranda, and sometimes even lost paperwork. As one might expect, this is not history Macauley or Gibbon-style: this is not the Roman Empire, after all, but one specialized federal court.

II. Judges v. JAGs

Lurie's history reveals a theme of conflict between the court and the armed services. The first period of conflict extended throughout the 1950s. As Lurie points out, the first conflict "burst open" in 1954-1955³ and extended throughout the decade. The UCMJ, and to a lesser extent, the USCMA, was bitterly resisted. In 1956, the Chief of Naval Personnel, Vice Admiral J.L. Holloway, testified to Congress that the UCMJ "has not only hamstrung the commanding officer with administrative minutiae, but it has weakened his historical role . . . that of a wise, just fatherly mentor, quick to punish the sinners and equally quick to help a man redeem himself and start afresh."⁴ The following year, the outgoing Army Judge Advocate General, Major General Eugene Caffey, stated in an annual report that some sections of the UCMJ, "while burdensome in peacetime, could seri-

3. LURIE, *supra* note 1, at 74

4. *Id.* at 120 (quoting Vice Admiral J.L. Holloway, *House Armed Services Committee on H.R. 6583*, 84th Cong., 1st Sess., March 15, 1956, 8443, 8445).

ously impair the effective administration of military justice in time of war.”⁵

The USCMA, as then conceived, also came under criticism. Caffey’s successor, Major General George Hickman Jr., joined the chorus of complaint in a 1959 annual report. In the report Hickman noted “an increasing lack of confidence in the present system of military justice because of its growing complexity and difficulty of administration.”⁶ Another report from that year attacked the three judge composition of the court, claiming the need for more stability and consistency, and proposed a five judge court instead, but with the two additional judges selected from military officers with at least fifteen consecutive years of judge advocate experience!⁷

According to Lurie, by the mid-1960s, “doctrinaire opposition” to the existence of the Court and Code seemed to have been abandoned.⁸ When Senator Sam Ervin proposed legislation that would result in the Military Justice Act of 1968, the most comprehensive military justice legislation other than the UCMJ itself, the Army Judge Advocate General’s (JAG) Corps, instead of total resistance and rejection, came up with a series of counter-proposals to Ervin’s legislation.⁹ Perhaps as a result, the Military Justice Act of 1968 represented something of a compromise. While it firmly established the presence of the military judge, some of the more extreme “civilianizing” proposals, such as having the USCMA review administrative discharges and abolishing the summary court-martial, never materialized.¹⁰

Yet, near the conclusion of the book, Lurie notes that conflict burst open again. Indeed, it might be said that the late 1970s were a renewal of the “Judges v. JAGs” conflict as intense and bitter as anything in the 1950s. Indeed, the conflict between the Court and the military community (not just JAGs) became so intense in 1978 that the General Counsel of the

5. *Id.* at 136 (quoting Major General Eugene Caffey, 5th Annual USCMA Report File (1956), at 33-34).

6. *Id.* at 154 (quoting Major General George Hickman, Jr., 8th Annual USCMA Report File (1959), at 43).

7. *Id.* at 155. Of course, CAAF is currently a five judge court. However, the prohibition against it having members with more than twenty years of military service still stands.

8. *Id.* at 191.

9. *Id.*

10. *Id.* at 192-94.

Department of Defense (DOD), Deanne Siemer, sought to have the USCMA abolished altogether!¹¹

This second conflict began with the arrival of Judge Albert Fletcher Jr., appointed as Chief Judge by President Ford in 1975. The difference this time, was that, rather than reacting to attacks from JAGs and the military community, the “Fletcher Court” went on an offensive to “civilianize” military justice. In a series of cases, the Fletcher Court sought to expand significantly the authority of the military judge (and accordingly minimize the convening authority’s role), supervise to a much greater extent the military justice system, and interpret “broadly the rights of individuals” in areas such as Fourth and Fifth Amendment law and jurisdiction.¹²

To some readers, Fletcher’s goals may appear laudable, though his methods lacking in political tact. To other readers, Lurie’s portrait of Judge Fletcher may reveal an arrogant and insufferable man. In a 1977 interview in the *Army Times*, Judge Fletcher said of the court: “We don’t serve the military. The civilians created us. We have no responsibility to the military. Our responsibility is to the civilian community called Congress.”¹³ Some may find even more insulting his comments made the following year to the Senate Appropriations Committee, when he asserted that the heavier caseload was largely a “natural by-product of the tremendous number of courts-martial which still are being tried in the Armed Forces as an easy substitute for good leadership.”¹⁴ In the end, Fletcher was replaced by Robinson Everett in 1980 and the controversy faded. Ironically, while many of Fletcher’s proposals for reform took hold in the military courts, his ultimate goal to make the military justice system an “exact mirror” of the civilian system¹⁵ was, in the end, rejected by the Supreme Court itself, which in a series of important cases in the 1980s, stressed the “separateness” of the military, and the unique role discipline plays in everyday military life.¹⁶

11. *Id.* at 257-58.

12. *Id.* at 244.

13. *Id.* at 247 (quoting *Army Times*, Nov. 28, 1977, at 30).

14. *Id.* at 256 (quoting United States Senate, Senate Committee Hearings, vol. 3390, 884 (1978)).

15. *Id.* at 248.

16. *See, e.g.*, *Solorio v. United States*, 483 U.S. 435 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Brown v. Glines*, 444 U.S. 348 (1980).

III. The Struggle for Identity and Respectability

Reading Lurie's book certainly reveals that the court's struggle for identity and respectability contributed to the problems between it and the military. This struggle is a theme that runs continuously throughout the book. How is the court viewed by other federal agencies? What is the court anyway? Is it comparable to a federal district court, a specialty court such as the U.S. Tax or Claims Courts, or simply a glorified administrative agency? Should its judges receive life tenure? Lurie examines these questions and others in charting the court's journey of its first thirty years.

Lurie's history, again and again shows examples of the court being derided in some fashion as being unimportant or less than competent. Comments from various government officials in Lurie's book indicates the court had to struggle to overcome a reputation as second rate: for example, during the search for Chief Judge Quinn's successor, White House Personnel Director, John Macy commented that while the job "pays well," it was "not very demanding" and finding a replacement was "low priority."¹⁷ And, in a letter written in 1952, the Chairman of the Senate Judiciary Committee wrote that the USCMA was "not now actually a 'court' in the Constitutional sense at all, but is merely a sort of a review board of last resort for the purpose of considering appeals from court-martial convictions."¹⁸

Even in the early 1970s, various efforts to equate itself with a U.S. District Court, much less a U.S. Court of Appeals, did not convince: as Lurie points out, Robert Duncan, the first black to sit on the court, resigned to accept a Federal District Judgeship in Ohio, after just three years on the court, stating that work on the court was not sufficiently intellectually challenging.¹⁹ Yet undoubtedly the worst blow to its prestige and esteem must have come from the Supreme Court itself, in the 1969 opinion *O'Callahan v. Parker*.²⁰ In an opinion dripping with scorn—Justice Douglas stating at one point that courts-martial are "singularly inept in dealing with the subtleties of constitutional law"²¹—the Supreme Court held that "service-connection" was required for an offense to be triable in military court.²²

17. *Id.* at 201.

18. *Id.* at 78 (quoting Letter from William Langer to Leverett Saltonstall, Apr. 29, 1953, (on file in Life Tenure Files, USCMA)).

19. *Id.* at 220.

20. 395 U.S. 258 (1969).

21. *Id.* at 265. *O'Callahan v. Parker* is discussed in chapter 9 of *Pursuing Military Justice*. See LURIE, *supra* note 1, at 209-14.

22. *O'Callahan*, 395 U.S. at 274.

If not as outright in their dismissiveness, the legislative and executive branches of the government often displayed indifference toward the court. The Military Justice Act of 1968 effected significant change to military justice. Yet, as Lurie points out, when it was ultimately passed, the “most important changes to the UCMJ since its adoption in 1950 were enacted by Congress without any sort of floor debate, let alone a formal roll call. . . . The thoroughness of congressional consideration was conspicuous by its absence.”²³ If the legislative branch showed indifference through silence, the executive could do so through sheer ineptitude. Nothing reveals governmental clumsiness better than Lurie’s subtly droll recounting of the saga of Chief Judge Quinn’s “lost retirement letter.” Chief Judge Quinn was due to retire in 1965, after serving his fifteen year term, though his service was extended until 1968. Yet when it came time to resign in 1968, the White House claimed it never received Quinn’s resignation letter, though according to Lurie, at least two copies of Quinn’s resignation letter are in President Johnson’s papers.²⁴ With the letter apparently misfiled, Johnson, for some reason (perhaps overwhelmed by other issues), never acted on the resignation. As a result, Quinn not only continued to serve after Johnson left the White House, but even after President Nixon resigned in 1974.²⁵

If finding respect and self-identify were difficult, the USCMA, especially in the early years, nevertheless performed heroically in defining the UCMJ as we now know it. After reading Lurie’s book, readers will probably conclude that the court, during its first two decades of existence, did an admirable job in fashioning rules that seem commonsensical now (such as prohibiting court members from consulting the *Manual for Courts-Martial* during deliberations), as well as answering critics within the military and satisfying Congress. In particular, Chief Judge Robert Quinn, despite his failed quest to obtain life tenure for the judges, seems to have been the right man to guide the court through the first twenty years of its existence. Quinn’s prudent and shrewd leadership illustrates that often it is better to have a veteran politician, adept at deal-making and handshaking, than a jurisprudential scholar at the helm.²⁶ To a great degree because of his per-

23. LURIE, *supra* note 1, at 199.

24. *Id.* at 203.

25. *Id.* at 205.

26. *Id.* at 16-19 (discussing Quinn’s background). Quinn had been heavily involved in Rhode Island politics which included a term as governor before being appointed Chief Judge.

suasion and charm, the USCMA survived as a viable entity during the first difficult years of its inception.

IV. The Problems with “Microhistory”

As indicated earlier, *Pursuing Military Justice* is not a book of watershed cases and sweeping public pronouncements. In fact, one could call the book a “microhistory,” as opposed to a “metahistory,” if the latter term refers to a sweeping survey of “great” historical events. It is history discovered in documents and letters between civil servants whose names have not been remembered, if they were known to the public at all. Lurie’s challenge as a historian is making this compelling. At times he succeeds splendidly, as in his chapter dealing with the short tenure and untimely death of Judge Paul Brosman.²⁷ Brosman’s untimely death did not bring about any day of national mourning. He was one of thousands of members of a massive federal bureaucracy. But Lurie movingly records his death simply by letting Brosman’s colleagues speak for themselves.

Sometimes this microhistorical approach also allows the reader to understand the book’s larger themes in a more convincing way. For example, the parts of the book dealing with whether the court and its employees are subject to the Civil Service Commission—an executive agency—may seem maddeningly irrelevant. Yet, this dispute serves as a synecdoche for the larger struggle for identity by the court. Lurie’s discussion of the dispute reveals that this struggle was not just fought out in Congress or with JAGs, but spilled over into everyday decisions about employee status.²⁸

Of course Lurie’s approach has some obvious disadvantages. As might be expected, its major deficiency is that it fails to connect with the larger world, and fails to put the events in the larger picture. The reader may feel at the end of *Pursuing Military Justice* that he knows much about what the court is—its internal structure, its relationship with the military and Congress, its struggle for identity. Yet there is much less a sense of what the court does, much less the ramifications of its decisions on the military. Numerous watershed cases go by unmentioned, such as *United States v. Fisher*, the first case which applied concepts from federal civilian law to military law.²⁹ Other cases, such as *United States v. Jacoby*, which

27. *Id.* at 104-06

28. *Id.* at 40-42, 124-26, 138-42, 249-50.

29. 4 U.S.C.M.A. 152 (1954).

held that the Constitution could apply to service members and thus superceded provisions of the UCMJ, are mentioned only in passing.³⁰

There is also too little mention of other federal court decisions and their impact on the court and the UCMJ. *Toth v. Quarles*, the first major Supreme Court decision on military justice, is mentioned only as a footnote to the *O'Callahan* case.³¹ Furthermore, Lurie does not indicate what effect *O'Callahan* had on the military justice system, except with a brief overview of the follow-up *Relford v. Commandant* decision.³² While *United States v. Calley* is examined in *Pursuing Military Justice*, no mention is given to the battles over Calley's conviction in the federal district court. Specifically, that Calley was granted a writ of habeas corpus by the U.S. District Court in Columbus, Georgia on "constitutional grounds," and the subsequent opinion by the Fifth U.S. Circuit Court of Appeals, which ultimately upheld the conviction.³³

Professor Lurie may have purposely chosen to leave case analysis to lawyers, and indeed excellent work has already been done on many of the court's cases by distinguished military practitioners such as Brigadier General John Cooke (as Lurie himself acknowledges).³⁴ Yet, many extra-legal events occurred during the court's early years as well, and they must have had major impacts on the debates concerning both it and the UCMJ. The reader is hardly aware, for instance, that in the summer of 1950, shortly after the UCMJ was enacted and while the court was settling in, Americans were fighting for their lives in the Pusan Perimeter. If such a "hot war" goes by without much attention, the forty-year long Cold War goes by totally unreferenced.

Of course the Cold War is a gigantic chunk of history that could easily overload a simple history of the court, but without it as a context, it may be hard to assess the various arguments that were made at the time about the proper direction of military justice. If a JAG officer was vehemently opposed to the UCMJ in 1954, would it be fair just to say that he was just

30. 11 U.S.C.M.A. 428 (1960).

31. 350 U.S. 11 (1955) cited in LURIE, *supra* note 1, at 209 n.14.

32. 401 U.S. 360 (1971) quoted in LURIE, *supra* note 1, at 212. Furthermore, no mention is made in the book to cases such as *United States v. McCarthy*, 2 M.J. 26 (1976), in which USCMA applied *O'Callahan* and *Relford*.

33. LURIE, *supra* note 1, at 218-20. The Fifth U.S. Circuit Court of Appeals opinion is *United States v. Calley*, 519 F.2d 184 (1975).

34. LURIE, *supra* note 1, at 243 n.50. Lurie relied on (then) Captain Cooke's analysis of USCMA decisions from 1975-80.

a product of a reactionary and slow-moving military culture? Or perhaps by looking at the times he lived in—a brutal “hot” war with Korea just ended with tens of thousands of American dead, a tension-filled Cold War with the Soviet Union and China in continuous escalation—might one concede somewhat his points that, discipline, after all, is what is first and foremost important in a military justice system?

I suggest that a more inclusive view of historical events can be found in one of Professor Lurie’s own books—the one that gained him prominence in his field, *The Chicago Board of Trade, 1859-1905*.³⁵ In that book, Lurie not only writes about the Chicago Board of Trade, he extensively examines the so-called “bucket shops,” the ramshackle trading houses that were little more than speculative casinos.³⁶ In his study of these shops, Professor Lurie reveals a fascinating counterpart to the Board of Trade. He examines the various efforts the Board took to suppress the shops, the bucket shops’ reactions to the Board’s efforts, and public reaction to the conflict.³⁷ Thus we come to learn not just about the Board’s internal practices, but how the Board influenced the society it operated in. While much of *Pursuing Military Justice* is superb, this reader came away wishing Professor Lurie could have applied his considerable historical skills in similarly revealing the Court’s interaction—and impact—in facets of military society.

V. Conclusions

At the end of this second volume on the USCMA/CAAF, Lurie notes that a central theme in his book has been the “tension between the JAGs and the Court . . . [It] is a dominant theme in this volume, and one that has not yet been played out. In fact, it may never be resolved.”³⁸ To a certain degree this is true. Yet most current practitioners would surely agree that there is little tension today between JAGs and the court—at least not of the kind during the 1950s and late 1970s. Few JAG officers doubt the necessity and the overall effectiveness of the UCMJ, and while JAG officers

35. JONATHAN LURIE, *THE CHICAGO BOARD OF TRADE, 1859-1905: THE DYNAMICS OF SELF-REGULATION* (1979).

36. *Id.* at 75-104, 139-67, 175-98.

37. *Id.*

38. LURIE, *supra* note 1, at 274.

question court decisions on a daily basis, few question the court's basic legitimacy.

There is, however, much current debate over the future of the UCMJ as well as the court. At the end of the book, Professor Lurie also points to what he perceives are some of the problems: "Traditionally and unnecessarily clothed with a reputation for the arcane, contemporary appellate military justice still suffers from a lack of critical civilian scrutiny, constructive interplay with civilian jurisprudence, an effective and functioning bar, and finally from a jurisprudence-in the post-Fletcher era-increasingly has tended to benefit the prosecution." There is some truth to this. While the reputation of the court is undoubtedly better than what it was during the *O'Callahan* era,³⁹ this should not cause anyone to rejoice too quickly. Questions and problems still remain.

Still, one may question some of Lurie's conclusions. After all, some may challenge Lurie's assertion that a jurisprudence that tends to "benefit the prosecution" is a problem that the court "suffers" from—some may see this simply as a restoration of sanity and common sense. One may further question how much good an "effective bar" would do for the court: some would view the civilian bars in the American legal system as at best complacent and at worst complicitous in permitting the free-fall spiral that the legal profession has been in (at least in the public's eyes) for the past three decades. Finally others may argue, that, if anything, it is the *over*-civilianization of the system—a system designed to please commanders, congressmen, civilians and Sixty Minutes at the same time—that is causing military justice to immolate publicly in one major investigation and prosecution after another.

Nevertheless, while one may question Lurie's conclusions, and may feel that his study of the court is not as comprehensive as it could have been, *Pursuing Military Justice* provides a superb history of USCMA/CAAF's first thirty years. Professor Lurie has performed a service for all military justice practitioners and scholars. This second volume and the first, *Arming Military Justice*,⁴⁰ are the best books on their subject. This reader hopes that soon Professor Lurie will provide us with a third volume in the series.

39. *Id.* at 276.

40. JONATHAN LURIE, *ARMING MILITARY JUSTICE: VOLUME 1, THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1775-1950* (1992).

VIETNAM STORIES: A JUDGE'S MEMOIR¹REVIEWED BY COLONEL FRED L. BORCH²

Vietnam Stories: A Judge's Memoir is the only published first-person account by an Army lawyer about his experiences in Vietnam, and judge advocates should read the book simply for this unique reason. The author, Jack Crouchet, who retired in 1977 as a colonel in the Judge Advocate General's (JAG) Corps, is to be commended for capturing for future generations a judge's view of courts-martial practice in combat. His narrative, which tells the story of his one-year tour of duty from July 1968 to July 1969, is well written, and certainly entertaining. Additionally, as a first-hand perspective of military justice prior to the revolutionary reforms enacted by the Military Justice Act of 1968, *Vietnam Stories* offers a view of a court-martial system that no longer exists. Finally, because Crouchet's discussion of specific court-martial cases ultimately is about the role played by law and lawyers in the American Army, judge advocates will find *Vietnam Stories* to be a thought-provoking read.

Despite these positive features, the book has a number of shortcomings that unfortunately diminish its value. First, Colonel Crouchet never explains fully the purpose and function of military justice in the Army, or the role played by commanders, convening authorities, and lawyers in the legal system. As the military criminal justice system is different from civilian criminal legal systems, and as *Vietnam Stories* is written primarily for a non-military audience, the author should have addressed these and related issues. Second, in discussing individual court-martial results, Jack Crouchet never addresses the larger question of whether military justice "worked" in the combat environment of Vietnam. As this continues to be a controversial point among Army lawyers who served in Southeast Asia, Colonel Crouchet's view on the matter belongs in his book. Finally, in writing *Vietnam Stories*, the author altered identities and disguised facts to such an extent that it is virtually impossible to check the accuracy of his narrative. Because the value of *Vietnam Stories* depends to a great extent upon it being a true account, Jack Crouchet's failure to provide any corroboration for his memoir means that a reader must accept his narrative at face

1. JACK CROUCHET, *VIETNAM STORIES: A JUDGE'S MEMOIR* (1997); 261 pages, \$27.50.

2. Judge Advocate General's Corps, U.S. Army. Currently serving as Staff Judge Advocate, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia.

value. But this will be hard for some to do, especially as parts of the book are about events in which Crouchet never participated. In short, while *Vietnam Stories* is worth reading, some judge advocates will be disappointed.

Vietnam Stories is written in chronological order; the first pages begin with Colonel Crouchet's arrival in Vietnam in July 1968, and the book ends twelve months later with his Date Eligible to Return from Overseas. Crouchet's assignment was to be one of three general court-martial "law officers" in Vietnam. At this time in history, judge advocates usually participated only in general courts-martial; special courts were the province of non-lawyer "line" officers, who prosecuted and defended the case before a panel of officers (and enlisted members, if an enlisted accused so requested). There was as yet no "military judge" in the military justice system but, at general courts-martial, a senior Army lawyer did act as a "law officer." As the law officer ruled on evidentiary matters, and instructed the jury on findings and sentencing, he was often referred to as the "judge," but his authority in court was not the same as today's military judge. Perhaps the most significant difference was that an accused had no option to request trial by military judge alone; every court-martial was a "trial-by-jury," and that jury determined guilt or innocence, and if necessary, an appropriate sentence.

Jack Crouchet entered the JAG Corps in 1951. With roughly seventeen years as an Army lawyer at the time he departed for Saigon, and with prior experience as a law officer at Fort Polk, Crouchet was ideally suited to be a judge in a war zone. Thus, while he heard some cases in relatively secure areas like Saigon and Long Binh, Crouchet also traveled from the Mekong to the Demilitarized Zone to try courts-martial. Each trip required him to carry a large briefcase filled with law books and a small suitcase for personal items. He also wore "a steel helmet, flak jacket, and a .45 caliber pistol, in addition to normal combat gear."³ He and his two fellow law officers were in combat zones "four or five days a week,"⁴ and slept in bunkers, ran to shelters during mortar attacks, and flew in small planes and helicopters over enemy-held territory. Each week, however, Jack Crouchet returned with the other judges to Saigon, where they had comfortable rooms in the Rex Hotel, and enjoyed the bars, restaurants, and other cul-

3. CROUCHET, *supra* note 1.

4. *Id.*

tural pleasures of city life. In short, no judge advocate could have had a broader look at the war in Vietnam than Jack Crouchet.

For more than 250 pages, Colonel Crouchet weaves a narrative that includes a number of interesting court-martial cases, and his own musings on the war in Vietnam. He concluded very early in his tour of duty that combat touched only a few. There were over 500,000 soldiers in Vietnam in 1968 and, while roughly 200 American soldiers were killed each week during the year that Crouchet was in Vietnam (with more than three times that number wounded), only twelve percent of U.S. troops were actually engaged in fighting the enemy on the ground. Eighty-eight percent were involved in supporting these warfighters; these men and women never fired a shot in anger. This was the nature of the war in Vietnam and the author does a great job in explaining how some Americans waged war while others enjoyed civilian luxuries.

In presenting a judge's view of military justice in Vietnam, Colonel Crouchet discusses more than twenty cases. Many involved military offenses. In one case, for example, a soldier refused to comply with a non-commissioned officer's (NCO's) order to "get out of bed." After the soldier subsequently refused identical orders from his platoon leader and company commander, and then, "in a fit of passion" threw a chair in the direction of his superiors, he was court-martialed. The accused was sentenced to one year's confinement, but no punitive discharge. In another general court-martial case, a soldier was charged with absenting himself from his unit to avoid hazardous duty. The accused soldier had, on three different occasions, gone away from his unit after having been assigned to night combat patrols. The accused returned to the unit shortly after the patrols had departed. The court panel found him guilty of all three charges and sentenced him to five years confinement and a dishonorable discharge.

Cases like *United States v. Stoss*⁵ fell into a different category, for these reflected badly on the American presence in Vietnam. While on patrol, Private First Class Stoss shot a Vietnamese man who ran away from him. The American then "finished him off" by striking him in the head with the butt of his rifle. This killing, however, had not gotten Stoss in trouble. Rather, he was being court-martialed because, having been previously dared by an NCO to prove his courage and bring back some "gook" ears, Stoss now cut off the ears and index finger of the dead man. In relating the facts and circumstances, Judge Crouchet writes that Stoss, who was

5. *Id.*

convicted of mutilating a corpse, should also have been prosecuted for murder, as the evidence indicated that he had killed the man without justification. *Vietnam Stories* contains a number of other cases similar to *Stoss*, and all make for fascinating reading.

Jack Crouchet does an excellent job in bringing to life the facts and circumstances of each court-martial in *Vietnam Stories*. One wishes, however, that he would have shared his views on the role of the military judge in the process, especially as, in many cases about which he writes, he disagreed with the convening authority's decision in referring the case to trial, or with the result reached by the court members. What was his "judicial philosophy" as a law officer? Did he, for example, believe that his role was merely to act as a referee between the trial counsel, defense counsel, and court members? Was his role simply to make rulings on evidence and instruct the panel? Or did he believe that his role as law officer also included a responsibility to see that justice was done? Did he think he had an obligation as a law officer to promote discipline? Did he believe that the law officer should speak with the convening authority about proceedings in which a sentence imposed was too harsh, or a manifest injustice had occurred? *Vietnam Stories* would be a better book if Colonel Crouchet had shared opinion on these and other related legal issues.

Vietnam Stories would also be better if the author had explained the philosophical foundation of the military justice system. Military criminal law does seek to do justice but, unlike civilian criminal legal systems, it also has a second purpose: enforcing good order and discipline. As Crouchet wrote his memoir for the non-military reader, he should have explained this unique aspect. He should have addressed the role of the convening authority in the Uniform Code of Military Justice (UCMJ), and the tremendous power of that authority. Looking at the role of the commander would have then permitted a brief examination of command influence in the court-martial process, and how the reforms enacted by the Military Justice Act of 1968 sought to alleviate unlawful command influence. *Vietnam Stories* also fails to explain that, unlike civilian criminal legal systems, charging starts with a commander, and not a prosecutor. It does not explain that court members who decide guilt or innocence also determine the appropriate sentence. Non-military readers would appreciate learning about these and other unique features of military justice, if for no other reason than it would help them better understand Crouchet's stories about courts-martial.

Crouchet also should have discussed whether the UCMJ worked while he was in Vietnam. This issue—whether the UCMJ functions in a combat environment—was hotly debated by Crouchet’s contemporaries. It remains a controversial issue today. Thus, it is disappointing that Crouchet, with his unique perspective as a trial judge, never answers these questions in *Vietnam Stories*: Was military justice fairly administered? Did the accused believe he received a fair hearing? Was justice done? Were commanders satisfied that courts-martial enhanced good order and discipline? Did convening authorities exercise their powers appropriately? Did Crouchet’s experiences as a law officer convince him that the changes enacted by Congress in 1968 were for the better? Was it a good idea to “civilianize” the UCMJ? Was it wise to insert judge advocates into special courts?

In the end, the author’s failure to discuss his judicial philosophy, to explain the nature of military justice, and to evaluate whether it worked in combat, may perhaps be excused. After all, *Vietnam Stories* is a memoir, and not a formal history. As Crouchet states in his preface, the book is “is not a scholarly report with statistical accuracy, but is written with the purpose of presenting to readers an interesting overview of the cases tried, and sharing with them my own unique experiences.”⁶ This disclaimer certainly permits Colonel Crouchet to write about events *as he remembers them*—and thus one should not quarrel if certain facts are “incorrect.” That is the nature of a memoir.

On the other hand, the value of *Vietnam Stories* depends almost exclusively on it being a true report of military justice as it existed at the height of the war in Southeast Asia. Unfortunately, the reader who wants to verify the truth of what he is reading will have great difficulty. Crouchet has provided no index and no footnotes or endnotes. Additionally, he has apparently altered the name of every court-martial case about which he writes, and so it is nearly impossible to obtain additional information about the cases. Moreover, even if a reader has access to trial records now in the custody of the Clerk of Court at the Army Court of Criminal Appeals, those records are filed by name and court-martial number. As Crouchet has disguised the identity of each accused, it will be impossible to retrieve any records using the existing filing system.

One example shows why it is important to be able to verify the accuracy of Colonel Crouchet’s narrative. In a chapter titled, “Rape and Mur-

6. *Id.*

der at the Americal,” the author writes about the prosecution of Captain Robert Cole. Two Vietnamese women were detained by men under Cole’s command, and then raped and killed. This led to Cole’s trial for failing to report a non-battle death of a female detainee who was killed while in the custody of his unit, and failing to enforce safeguards to protect female detainees in his unit’s custody.

As Crouchet quotes extensively from the record of trial, I looked for *United States v. Cole*⁷ in the Court Martial Reports (CMR). It is not listed; there is no record of a general court-martial of an officer with that surname. By thumbing page-by-page through CMR volumes published during this period, however, I discovered that the true name of the decision is *United States v. Goldman*.⁸ Captain Leonard G. Goldman was prosecuted and convicted in September 1968, and the facts related in *Vietnam Stories* as the case *United States v. Cole* appear to be accurate. But the judge who heard the case was Colonel Paul Tobin, not Colonel Crouchet. While Colonel Crouchet never states that he presided over this case, some readers will find it disingenuous for a judge’s memoir to be about a criminal trial in which he never participated. After all, a memoir is a history or narrative composed from personal experience and memory, and the *Goldman* case is a part of neither.

Finally, why change the name of the accused? That Leonard Goldman was tried and convicted is a matter of public record, and it makes no sense to alter his identity, particularly since such a change makes it much more difficult to check the accuracy of Crouchet’s “memory.” Similarly, the prosecution of “Private First Class Stoss,” discussed earlier in this review, appears to be *United States v. Williams*.⁹ Again, one wishes that Jack Crouchet had reported the accused’s true identity.

Then there are minor errors, which also detract from the book. Then Major Earle F. Lasseter is misidentified as “Earle Lassiter,” an important point since there was an ‘Ed Lassiter’ in the Corps during this time. And the dustjacket shows a photograph of Paul “Tovin,” when it should be Tobin.

7. The author discovered by thumbing page-by-page through CMR volumes published during that period that the true name of the decision is *United States v. Goldman*, 43 C.M.R. 711 (1970).

8. 43 C.M.R. 711 (1970).

9. CM 419872.

Veterans' memoirs are critical to understanding modern warfare, and Colonel Crouchet's book about his year as a judge in Vietnam is no exception. As a law officer, he had a unique view of military justice in combat. His wide-ranging travels also gave Crouchet a perspective seen by very few judge advocates. Read *Vietnam Stories*, but do not expect to come away completely satisfied.